MADURAI KAMARAJ UNIVERSITY

(University with Potential for Excellence)

Distance Education

ACL-MKU
01159

B.G.L.

First Year

Paper - IV

LAWS OF TORTS AND CONSUMER PROTECTION ACT

(Recognised by D.E.C.)

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Dear Student,

The law of Torts introduces the student to a fascinating branch of law. It is a branch of law which is a record of changing moral and social philosophies. Its boundaires are ever expanding to meet a variety of changing social problems, caused by the rapidly changing habits in living and thinking. In the era of individualism tortious liability was based on the *fault principle.*

Apart from the fundamental rights guaranteed to man by the Constitution, man has certain inherent rights. He has a right to breathe clean air, a right to drink clean water, a right to see a bit of sky and green and a right to quiet meditation. Today pollution is a modern menance and the worst is pollution by noise, which violates our right of privacy and right to quiet meditation. The law of torts protects these rights. If your neighbour's dog barks at night disturbing your sleep or his radio blares out music which disturbs you, you can claim compensation in a civil court for this tort committed against you. Your neighbour has similar rights against you and you owe him similar duties. The law and more particularly the law of torts is a maze. You will enter this maze through one door and come out through another, or perhaps be lost in it.

The subject Law of Torts is divided into 10 units. Model University Question Paper is given for your guidance. During contact Seminar Classes, you get doubts cleared.

Good Luck!

Department of Law

SYLLABUS

LAW OF TORTS

Nature and Definition of Torts

- Definitions – Origin and development of torts – Nature of torts – law of torts in India – Tort and Crime – Tort and breach of contract – Fault Principle – No fault liability – Foundation of tortious liability – Essential conditions of liability in tort – Mental element in torts.

General Defences and Capacity of Parties

- General Defences – "Volanti non fit injuria" – Inevitable Accident – Act of God – Necessity – Mistake – Private defence – capacity of parties – Statutory Authority – liability of the state – tortorious liability of Judicial officers and qusi-Judicial authorities – Unborn person and Minors under the law of torts – Corporations and unincorporated bodies – Foreign Sovereigns and ambassadors

Theories of tortious liability

- Vicarious liability – casual Delegation – course of employment theory – liability of master for fradus of servent – liability of hospital authorities – Doctrine of common employment – liability of the independent contractor – Joint tortfeasors – Independent tortfeasors – Remoteness of damage – Test of causation theories – Foreign Torts – Effect of death of parties in torts – statutory exceptions – Tests of foreseability and direct consequences – Norces actus interveniens.

Negligence

– Negligence – Mental status – separate tort – Duty to take care – The classical pronouncement on negligence – Medical negligence – contributory negligence.

Specific Torts – I – Injuries to the person

– Classification of specific torts – Assault and Battery – False Imprisonment – Nervous Shock – torts affecting domestic relations – torts reating to parantal rights.

Specific Torts – wrongs to property

– Trespass to land – Trespass to goods – Nuisance – strict liability – absolute liability – liability for animals – liability for land and dangerous structures of premises.

Specific Torts – Torts against Reputation

– Defamation – libel and slander – Essentials of defamation – Defences – Privileges – Defamation by or to husband and wife.

Conspiracy and business related wrongs

– Conspiracy – Interference – with freedom of contract – Fraud (or) deceit – passing off – trade mark and patent right – Abuse of legal procedure – Malicious Prosecution – Malice – Malicious arrest.

Remedies and Discharge of torts

– Miscellaneous Torts – Doubtful Torts – Discharge of torts – Remedies and damages – kinds of damages – irrecoverable damage.

Consumer Protection Act

– Scope and object of the Consumer Protection Act – Definition and Explanations – District forum – State Commission – National Commission.

BOOK FOR REFERENCE

(i)	Winfield and Jolowicz	-	Torts
(ii)	Salmond	-	Law of Torts
(iii)	Ratanlal	-	Law of Torts
(iv)	Achuthan Pillai	-	Law of Torts
(v)	Ramasamy Iyer	-	Law of Torts
(vi)	Dr. N.V. Paranjape	-	Law of Torts
(vii)	R.K. Bangia	-	Law of Torts

STATUTORY MATERIALS

- Consumer Protection Act – 1986
- Fatal Accident Act
- Moter Vehicle Act

CONTENTS

Unit No.	Topic	Pages
1.	Nature and Definition of Torts	1
2.	General Defences and Capacity of Parties	39
3.	Theories of tortious liability	75
4.	Negligence	128
5.	Specific Torts – I – Injuries to the person	142
6.	Specific Torts – Wrongs to property	155
7.	Specific Torts – Torts against Reputation	191
8.	Conspiracy and business related wrongs	211
9.	Discharge of Torts and Remedies	231
10.	Consumer Protection Act	243

UNIT – 1

NATURE AND DEFINITION OF TORTS

INTRODUCTION

Torts is the branch of law governing actions for damages for injuries to certain kinds of rights, like the rights to personal security, property and reputation. In England the rules regarding this branch has been slowly developed by the courts during several centuries. This branch of law has therefore attained great proportions and attracts a very large amount of litigation in England as well in the United States, though not to the same extent in India.

The word 'tort' in law means a wrong or injury which has certain characteristics. It was introduced into the terminology of English law by the French speaking lawyers and judges. It is generally recognised that it is not possible to frame any precise or scientific definition of a tort. So we proceed to discuss the definition of the term 'tort' which bears special and technical sense.

UNIT OBJECTIVES

- To trace the origin and growth of the Law of Tort.
- To discuss the development of Law of torts in India.
- To study the distinction between crime and Tort.
- To analyse the various principles under the law of Torts.
- To understand the 'Fault Principle' and "No Fault liability" theory.
- To study the mental element in Tort.

UNIT STRUCTURE

1.1. Origin and development of Torts

1.2. Nature of tort

1.3. Law of Torts in India

1.4. Difference between Tort and crime

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1.5. Distinction between the Tort and breach of contract

1.6. Fault Principle

1.7. No Fault Liability

1.8. Foundation of tortious liability

1.9. Essential conditions of liability in Tort

1.10. Mental Element in Torts

1.11. Definition of Tort

1.12. Summary

1.13. Answer to Check you progress

1.14. Key words

1.15. Model questions

1.1. ORIGIN AND DEVELOPMENT OF TORTS

Only living things can grow. Law is a living science. Therefore it grows from time to time. The law which did not give space for the feeling of the mankind will die. The law which gives space for the feelings of the man will grow and live together with man. When the mankind grow in many dimensions, the law also will grow in many dimensions with man.

Historical development

The "Law of Torts" is based on decided cases. It has been evolved out of a system of Legal procedure and judicial decisions from sixteenth century.

The judicial decisions in some cases had depended upon the personality of the "Judge" who had delivered that particular "judgement". His view on that particular matter will attract attention of the people living at that particular time and jurists. If it was a good view, it would be followed as a precedent subsequently.

Example: M.C. Mehta-vs-Union of India. In this case Supreme Court introduced a principles "absolute Liability." (Justice Bhagawathi)

Role of the Judge

In olden days judges were proud only in knowing the Law and following the Law. Now it is not the position. The judges must take into account the society and the changes that takes place in the society in which they live. Therefore a student of Law who understands the principles upon which the formulae have been built can construct the Law. The Latin Maxim is **"Solex Popule suprema Lex".** The Law must serve the national interest. The citizens interest is supreme interest.

Skill of the Judge

The Law of Torts as administered in India is the Law of England which is modified by the judges of High courts and Supreme court and the Legislature of a particular state and the Parliament. The Law of Torts which is followed in England now is based upon the "Common Law". The term "TORT" is the French equivalent of the English word "WRONG". It is also derived from the Latin term "TORTIUM" "which" means "to twist".

The term "Tort" was introduced into the English common Law by Norman jurists. In the courts administering such common Law of which law of Torts is a division, an "action" was commenced usually by a "Royal Writ" issued from the "Chancery". This "Writ" was an "Order" of the "King", issued by the Chancellor of his office requiring the defendant to appear before court and answer the plaintiffs's complaint.

No one could bring an action in the Kings common Law courts without the King's writ. The forms of writ thus available were very limited. Every plaintiff had to pay a "price" for the issue of Writ in his favour and had to fit in his claim into any of the available writs, "Where there was NO WRIT, there was NO RIGHT".

But now the Law is "UBI JUS IBI, REMEDIUM. It means where there is a Right there is a Writ. If a man has a right, he must, it has been observed, 'have a means to indicate and maintain it and a remedy if he is injured in the exercise

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and enjoyment of it and indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal.

The writs that remedied the injuries which in modern times are called tort. They are of two types :-

i) the writ of trespass; and

ii) the writ of trespass on the case or simply 'case'

Writ of Trespass

Writ of trespass was intended to provide an effective remedy for all forcible and direct injuries whether to person and or to goods.

Cases on the other hand provided for all injuries not amounting to "Trespass". For all injuries which were either not forcible or not direct, but merely consequential.

By a process of extension through legal fictions the term "Forcible" came to include various wrongs like even a peaceful or slight interference with the person or property to another. To lay ones finger on another person without lawful justification is as much a forcible injury in the eye of law and therefore a trespass, as to beat him with a stick. To walk peacefully across another man's land is a forcible injury and trespass no less than to break into his house forcibly. But when there is no physical interference there is no tresspass and the proper remedy is "CASE", as for example in "Libel" or Malicious Prosecution.

To constitute a 'Trespass" the injury should not only be forcible, but must also direct and immediate. It did not extend to indirect or consequential injuries. An injury is said to be direct when it follows so immediately upon the act of the defendant. It may be considered consequential when by reason of some other interring cause, it is regarded, not as part of the defendants act, but merely as a consequence of it.

Check Your Progress

1. What is writ of Tresspass?

The distinction between those two classes of action "Trespass" and "Case" is brought out in **Leame-vs-Bray** in the year 1803. Where in Le Blanc.J. has observed; in all the books the invariable principle to be collected is that where the injury is immediate on the act done, there trespass lies. If it is not immediate on

the act done, but consequential there the remedy is in CASE. And the distinction is well established by the following example. If a man throwing a log into the highways if at the time of its being thrown, it hit any person it is "trespass". But if after it is thrown, any person going along the road receives an injury falling over it, as it lies there, it is "CASE". Neither does the degree of violence with which the act is done make any difference; for if the log were put down in most quiet way upon a man's foot it is Trespass, but if thrown into the road with whatever violence and afterwards falls over it. It is "CASE" and not "Trespass".

In this case, it was held that the defendant is negligently driving his carriage so as to bring it into collision with that of the plaintiff and was actionable in trespass.

Other illustrations which bring out the distinction, between action for 'Trespass" and "CASE" are:

1) The act of throwing water into one's neighbour's premises is a "Trespass"

2) But to fix a spout in such a way as to allow rain water to be discharge by it into these premises is actionable in "Case".

In an action for "Trespass" the act of the defendant need not be wilful or intentional. In CASE, damage is the gist of the action and the plaintiff will fail if is he cannot prove it. But in Trespass, it is not necessary to prove actual damage.

The action of "Trespass" had requirement that the interference complained of by the plaintiff must be the direct or immediate result of the defendant's act. "CASE" lay, on the other hand where the interference was only a consequential result of the defendants act. For example if the defendant threw a log into the highway, striking the plaintiff, trespass was the appropriate action. If the log lay in the highway and the plaintiff rode his horse into it, the proper action was "Case".

In the well-known case of **Scott-vs-Shepherd,** the defendant threw a lighted squib into a crowded market place. The squib was thrown on by two persons acting in self-preservation and for the protection of property. The second time it was thrown it hit the plaintiff in the face and exploded causing him

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to lose an eye. The majority of the court held the defendant liable in trespass. But Blackstone .J. dissented on the ground that the action should properly have been one of "Case". This uncertainty was made more serious by the fact that an incorrect choice penalized the plaintiff by the failure of his action.

The distinction between trespass and case was not of purely procedural significance. Trespass was actionable "Per se" that is without proof of damage : "Case" needed such proof.

There was however no association of any particular mental state with either form of action. Trespass may have involved strict liability in other words, have been actionable without proof that the defendant either intended or should have foreseen the interference with the plaintiff's interest, but the matter is controvertical. In any case, it lay where the defendant had acted either intentionally or negligently. "Case" tended to be more closely connected with negligence, because the types of harm for which it lay were more likely to be committed negligently rather than intentionally, for example actions for nuisance arise for damage by fire. But it would lie for intentional injury, thus the modern tort of deceit evolved from the action on the "case".

As a result of NOTIONAL advancement in several spheres of life and changes in socio - economic conditions alternations and adaptations in the "Law of Torts" were found necessary and to meet the modern needs, Torts also came into existence.

For example, Broadcasting and Television brought about new problems in connection with defamation, rail - road, and air traffic in respect of Law of nuisance, Negligence and personal injuries. Similarly, modern economic set up (as for example labour relation activities of trade associations) gave rise to violation of a "Right" or "Breach of duty" covered by Tort of "conspiracy" or "Passing off".

To meet such needs, the law of tort had been expanded either by enactments by the Legislature or by Judgments of courts. To cite some of such enactments - Motor vehicles Act, Factories Act, Workmen's Compensation Act, provide for redress in case of personal injuries and for payment of compensation.

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Forms of action have been thus restricted. A suitor who chose an inappropriate "Form" of action had to go out of court without redress (remedy) for his grievance, even though a substantial right had been infringed. This was that state of Law in England until nineteenth century.

By the **Common Law Procedure Act 1852**, it was provided that it shall not be necessary to mention any "Form" or cause of action in any "Writ" of summons by virtue of this enactment. "Remedies" were granted depending upon the "SUBSTANCE" of the Right, and not on whether they can be filled into any particular "Form of Action".

1.2. NATURE OF TORTS

It is business of "The law of Tort" to determine when the law will and when it will not grant redress for damage suffered. It does not follow, however, that a person suffered without being the victim of a "Tort", is necessarily without redress. He may be entitled to redress under some other branches of law such as the "Law of Contracts" or quasi-contract or by equity as for a breach of trust.

Forms of action were made unnecessary by the common law procedure Act of 1852, by which every pleading is to contain only a statement in a summary form of the material facts on which the party pleading relies.

The importance of substance over the Form is illustrated in **Letang Vs.Cooper (1964). 2. All. E.R. 929.** In this case Mrs. Letang, the plaintiff was on holiday in Cornwall. She was enjoying sunbath on a place of grass where cars were parked. While she was being there, Mr. Cooper, the defendant came to park driving his Motor car. He did not see Mrs. Letang, the car went over her legs and she was injured.

On 2 Feb.1961, more than three years after the accident, the plaintiff brought an action against the defendant Mr. Cooper, for damages for loss and injury caused by (1) the Negligence of the defendant in driving his motor car and (2) the commission by the defendant of a Trespass to person.

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The plaintiff's claim based on Negligence was clearly barred by times (which allowed only three years period for such actions). But under the present **English Limitation Act 1939** the period of limitation was six years in all actions founded on "Tort" and in this case the plaintiff relied on this provision alleging that her injury fell under the early English "writ of Trespass to person". Lord Denning observed "we have in this country shaken off their Trammel's."

If a Judge is satisfied that in the case before him, there has been a infringement of a legal right vested in the plaintiff he will be anxious to do justice to the injured irrespective of technical defects in the pleadings.

Case Law : United Australia Ltd.Vs.Barclays Bank (1941 A.C.1) the plaintiff's claim for the recovery of a cheque was sought to be resisted on some technical plea of waiver of torts but the Hosue of Lords rejected the contention and allowed the plaintiffs suit. Lord Atkin said "Fantastic resemblances of contracts invented in order to meet requirements of law as to forms action which have now disappeared should not in these days be allowed to affect actual rights. When these ghosts of the past stand in the path of justice clanking their medival chains the proper course for the judge is to pass through them undeterred.

The second point is that, apart from the wrongfulness of the conduct involved in the Tort, the type of person responsible for the conduct, and in some cases the relationship between the tortfeasor and his victim may also be relevant. For example to commit the tort known as **Rylands. Vs. Fletcher**; it is necessary to be an occupier of land, and one who allows a dangerous thing to escape from his land, he does not occupy nor commit that tort. An example of relationship affecting the "wrongfulness" of conduct is the liability of an occupier of premises towards a visitor on those premises. Liability for negligent acts in relation to those premises under **Defective Premises Act 1972** exists, only when the relationship of occupier and lawful visitor is established between the defendant and the plaintiff.

Check Your Progress

2. Write a Note on the development of Law of

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1.3. LAW OF TORTS IN INDIA

Much of our Laws have been borrowed from England. The Law of Torts is no exception to this general statement.

In **Surrender Nath - vs - District Board Naida (AIR 1942 Cal 360)** Mukkerji. J. observed, that in the case of Tort there being no Indian statutory Law, the Indian courts have always adopted the English common law as being consonant to Justice, equity and good conscience. Only when a particular rule of English law was unsuitable to local conditions, they have departed from the rule.

1.4. DIFFERENCE BETWEEN TORT AND CRIME

A tort differs from a crime in Four respects.

i) As regards the consequences of the act or omission.

ii) As regards procedure.

iii) As regards redress or remedy.

iv) As regards their history.

(i) As regards the consequences of the act or omission:- Tort is an infringement or privation of the Private or civil right belonging to individuals, considered as individuals, whereas, crime is a breach of public rights and duties which affect the whole community considered as community. So private wrongs or civil injuries are tort, public wrongs are crimes.

(ii). As regards procedure:- As already pointed out, in tort the civil suit shall be instituted only by the person wronged and by none else; but in a crime as it is a wrong to the public at large proceedings can be instituted, with a few exceptions only by any member of the public although the actual injury has been inflicted on an individual only and therefore subject to a few exceptions, criminal proceedings are instituted by the State, or on its behalf, even if instituted by an individual.

Check Your Progress

3. Distinguish between the tort and crime.

(iii) As regards redress or remedy: In a tort it is compensation and in crime punishment. The underlying principle of redress is, therefore different in

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both. In crime, punishment has as its object the deterrence or prevention of crime or the satisfaction for retributive indignation provoked by the commission of the crime or the reformation of the convict: But in tort it is reparation by compensation of the damage caused.

(iv) As regards history: A crime really came from a tort. In ancient times wrongs which we today regard as crimes were regarded as only civil wrongs to be brought off with compensation. Gradually it came to be recognized that certain wrongs were so serious that they should be punished. Thus these wrongs came to be recognized as crimes.

An act may be a tort, as well as, crime, for example assault. Assault, being a violation of the right to the personal safety of an individual, is a tort but being a menace to the society in general it is a crime also.

1.5. TORT AND BREACH OF CONTRACT

(i) **Right in rem – Right in Personam :** Nature of right violated in a tort as pointed out, the right violated is a right in rem; but in a contract it is a right in *personam.*

(ii) **Parties :** In contract liability arises from breach of contractual duty whereas in tort liability arises from violation of a general duty imposed by law.

(iii) **Remedies:** In the case of breach of contract, the main remedy is specific performance of a contract or some other appropriate remedy such as accounting etc., the awarding of damages is only an additional or alternative remedy. In tort the main remedy is damages, the other remedies being supplementary or subsidiary.

(iv) **Damages:** In breach of contract. It is liquidated damages but in tort it is unliquidated to be fixed by the court.

Check Your Progress

4. Distinguish between Tort and Breach of contract.

The same act can either be a tort, or a breach of contract or a crime. All the elements of these different wrong doing may co-exist in a single action. For example, a man obtains goods from another by means of fraudulent

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misrepresentation and thereafter he sells them away and misappropriates the sale proceeds to his own use. This is a case, where the wrongdoer has committed all the three wrongs. To obtain goods by fraudulent misrepresentation is cheating and therefore, a crime. To sell the goods and misappropriate the sale proceeds for his own use is conversion and a tort and lastly, it is a breach of contract as the law implies a contract that the money therefore there is a right of reimbursement vested in the owner under **Section 73 of the Indian Contract Act**.

The law implies a contract on the part of the person so gaining the advantage to compensate the other party even though in fact there is no such contract. For example, A tradesman leaves goods at B's house by mistake. B treats goods as his own. B is bound to reimburse A, for the benefit he has had. In a quasi - contract the duty is towards a determinate person, whereas, in tort the duty is towards persons generally.

Tort and Breach of Trust

In a trust one person holds property in his name for the use and benefit of another called the beneficiary so that breach of trust by the trustee, the beneficiary can bring a suit for and claim compensation in a sum equal to the loss suffered by the property. So the claim is a liquidated sum of money.

1.6. FAULT PRINCIPLE:

Tort means a wrong : A "civil wrong", it is redressed through civil proceedings. The object of civil proceedings "Reparation and satisfaction" to the victim. A criminal wrong leads to proceedings before criminal courts. The objects of criminal proceedings are punishment to the wrong doer.

Illustration:-

"A" a Motorist, Negligently drives a car and knocks down a pedestrian "B" and there by causes bodily injuries to B, then A commits two wrongs. These wrongs are in violation of the law regulating to driving on public road. One is civil wrong and another one is criminal wrong. Thus the same act gives rise to two kinds of wrongs. The former is classified as a civil wrong or Tort. For the civil wrong of causing bodily injuries to the pedestrian by negligent driving he is

Check Your Progress

5. Explain – various mental element in law of Torts.

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liable to pay monetary compensation in the civil proceedings taken against the motorist in civil courts.

For the criminal wrong committed by the motorist, he is liable to be prosecuted before criminal courts and he will be punished.

Sir John Salmond's view

Salmond was of the view that liability should always be based on "fault"; which is based on "Morality". A man should be held liable for a wrongful act only if he had done it with intention or "Culpable negligence". There could be no justice by way of damages to the injured party if the act of injury was unintentional or accidental. The purpose of the decree awarding damages to the plaintiff is not mere damages to the injury but also a kind of punishment to the wrong doer. The principles of criminal law that an accused person can be convicted only if he had particular "Mens Rea" was considered fit for civil liability as well.

The principle behind **Rylands.vs.Fletcher (1856)** case is "fault liability". In this case, Rylands employed independent contractors who were apparently competent to construct a reservoir on his land. In the course of their work the contractors came upon some old coal mines, which were left unused, which can be called old shafts and passages on Ryland's land. They communicated with the coal mines of Fletcher, a neighbour of Rylands, but no one suspected this for they appeared to be filled with earth. The contractors did not block them up properly and when the reservoir was filled with water the water from it busted through the old shafts and 'flooded Fletcher's mines. He was not able to take coal from his mines. Fletcher sued Rylands. The House of Lords held Rylands liable. The Rule of law enunciated in the Court of the Exchequer by Blackburn.J. was affirmed as correct by the House of Lords. It was as follows. "We think that the true rule of law is that the person who for his own purposes brings on his land, collects and keeps there anything likely to do mischief, if it escapes must keep it at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape."

Case Law: - Donoghue. vs. Stevenson (1932 A.C.562) In this case the House of Lords held the manufacturers of Ginger Beer liable to pay damages to the victim a consumer.

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The manufacturers of Ginger Beer had sold to a retailer ginger beer in bottles of dark glass. The bottle, unknown to anyone contained the decomposed parts of snail which had found its way into the bottle at the factory. Mr. X purchased the bottle from the retailer and treated the plaintiff, a lady friend to its contents. Owing to the darkness of the glass nothing of the snail was discernible until Mr. X was replenishing the plaintiffs glass. In consequence, partly of what she had drunk and partly of what she saw. She became very ill. She sued the manufacturer for Negligence the "fault." House of Lords held that the manufacturers owed her a duty to take care that the bottle did not contain noxious matter and that the manufacturers were liable, if that duty was broken.

This theory is the First Theory. It was propounded by Holmes, and it is as follows. "The law began with liability based on fault, actual intent and actual personal capability which has tended to formulate as it grew external standards which might subject an individual to liability though there was no fault in him. For example, in the twentieth century, factory owners were held liable by the external standard imposed upon them by the legislature. Originally the rule was that a person can be held liable only if he has wilfully caused injury to another person. But nowadays a factory owner is held liable even if he was innocent. This is unmoral. So Holmes said that the development of law was from the moral standard of primitive communities to the unmoral standard of the twenty first century.

Prof. Wigmore's view

The second theory was put forward by Prof. Wigmore and was supported by Ames and Holdsworth. According to this theory the law began by making a man act at his peril and gradually became moralized until liability was based on fault.

Ames said "The ethical standard of reasonable conduct has replaced the unmoral standard of acting at his peril". The progress of law is from an unmoral standard to moral one. In illustration of this development they pointed out to the large number of cases of Negligence, where persons are held liable only if they are found negligent.

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Neither of the above views seems to be entirely correct. As is mentioned in Salmond's Tort, "The law has moved on cycles. A period of strict liability, an unmoral period is succeeded by a period of fault liability, a moral period and then the pendulum swings back again".

It is the conflict between "Standardisation" and "individualsation", between certainty in the law and concrete justice with application to particular circumstances.

Viewed from another angle the conflict arises from the aim of the law to protect two basis interests of the individual,

i) His interest in security, and

ii) His interest in freedom of action.

The protection of the first requires that a person who has been harmed as the result of the activity of another should be compensated by the other irrespective of the fault:

The protection of the second requires that a person who harms another should be required to compensate the other only when his activity was intentionally wrongful or indicated an undue lack of consideration for the interests of others.

If we examine the large number of decisions of England from fourteenth to the nineteenth century, we could say that it was a period of "Moralisation," and especially the nineteenth century when there were a number of cases relating to the liability for "Neligence".

If we examine cases of twentieth century we could find the tendency towards the opposite direction. Particularly in law enacted by the legislatures. Nowadays, there is a tendency in almost all cases, where there is no blame on either side to place the loss "on Him" who can bear it.

But "Fault" has never been and is not to day an essential element of tortious liability. The principle of **Rylands.vs.Fletcher** is against fault liability. Naturally this decision was not approved by **Sir John Solmond.** He referred to it in the following words:

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"No decision in the "law of Torts" has gone more to prevent the establishment of a simple, uniform and intelligible system of civil responsibility.

The principle that a man should be held liable only if he had a particular guilty state of mind is called a moral one as innocent persons are not punished by its application. On the other land all cases where a man is held liable irrespective of his mental state is called an unmoral theory.

Socialistic Doctrine in law of Torts

The present tendency of the legislature particularly in the twentieth century is to make those persons liable who could afford to pay. This may be due to the influence of "socialistic Doctrine", "Let the man who can afford pay". This seems to be the basis of certain modern Acts such as "Workmen Compensation Act". There seems to be no sovereign virtue in holding that where the loss falls there it must lie. Under the workmen compensation Act, if a work man suffers an injury in a factory owned by his master, master is compelled to pay compensation, to the workman, even though the master had nothing to do with the accident, and was really innocent of the whole matter.

It is said that in our days, the **Rule in Rylands vs. Fletcher** flourishes, the owners of aircrafts have been made liable without proof of negligence and the responsibility for the acts of independent contractors tends to increase and legislation is frequently imposing criminal penalties upon blameless defendants".

Absolute duty means a duty that exists independently of fault. It is said that an employer's duty to fence dangerous machinery is "absolute" because it exists even though it is commercially impracticable to fence the machinery securely.

Where there is no immediate Tort-feasor, the desire to discover, a solvent defendant who may be made liable to pay compensation to the injured also tends to establish strict liability. The attitude of "Welfare Tort Law" is indeed fostered by the existing law of vicarious liability and strict liability and a general tendency is observable towards a constant extention of liability without fault.

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1.7. "NO FAULT LIABILITY"

In India, under the Motor Vehicles Act, no fault liability has been introduced. If a person is injured in a motor vehicles accident, the injured will get 15,000/- rupees as compensation and in case of death, the victims family can claim rupees 50,000/- as compensation.

Fault and Compensation

In the majority of cases under English law, the plaintiff must show fault on the part of the defendant to make him in law responsible.

Despite the advant of the age of machinery and such inherently dangerous objects as industrial plant and high – speed locomotives, the courts have not adopted the view that those who carry on enterprises or activities in which such machinery plays a part should be liable without fault for the damage they cause.

"Our Law", said Scott L.J. in **Read. vs. Lyon & Co (1945 C.A.)** is concerned not with the defendants activities but with his acts". This rejection of enterprise or activity liability seems doubly unfortunate. First, it discards the justice of holding liable those who though no fault can be proved against them in the individual case, have increased the risk of injuries by carrying on a certain activity.

Secondly, the enterprise is normally in a better position than the victim to absorb the loss suffered by having to pay damages, either by passing it on to the public in the form of prices it charges for its product.

Read vs.Lyon is significant in this respect. In it, the House of Lords rejected an attempt to argue a principle of strict liability for the carrying on of hazardous activities postulated on the basis of the rule in Rylands.vs.Fletcher (1868) which established that under certain conditions strict liability existed for the escape of dangerous things from the defendant' lands.

From the time of this decision, therefore the strict Liability in the English Law of Tort could only exist in the logically unsatisfactory form of the Rule in Ryland.vs.Fletcher itself, and in few other unconnected instances.

Facts of the case in Read vs.Lyon (1947 A.C.)

Where the plaintiff was employed as an inspector of amunitions in the factory, and in the course of her employment, was injured by the explosion shell that was being manufactured. There was no evidence on the part of the defendants. It was held that the defendants were not liable though the shell was a dangerous thing and the rule in *Rylands v.Fletcher* did not apply since there was no "escape" of the thing outside the defendant's premises.

No Escape : No Liability :- In this case "B" in the ordinary course of his duty went to a factory where explosive articles were being manufactured and sustained bodily injuries on account of an explosion. The defendants were held not liable by applying Rylands.vs.Fletcher.

Mackinnon L.J. said "the doctrine of Rylands.vs.Fletcher, as enunciated by Blackburn. J. was limited to the operation of the source of danger brought by a person on his land and of it caused damage outside the limits of his land to the person or property or a neighbour.

Rands-vs- McNeil (1945 C.A.) In order that the keeper should be liable it was necessary to prove that the animal escaped from his control. In this case the Court of Appeal dismissed the suit of a labourer who received injuries from a dangerous bull kept by a farmer in his farm, in a separate box.

No Unitary Principle of Liability

It has been stated above that tortious liability is referable to "no single principle". Mention must be made here, an attempt has been made to establish a principle which would constitute a sufficient though not a necessary condition for the existence of tortious liability.

In **Allen vs.Flood (1898)** it was argued that the malicious threat by the defendant trade unionists, lawfully to terminate their contracts unless the plaintiff was dismissed from his employment was not actionable in tort by the plaintiff who was dismissed by his employer. The presence of malice did not therefore made tortious what was otherwise a lawful act.

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In the light of this case it would be surprising if any other general principle of liability could be established. In **Donoghue vs.Stevenson** the judgment of the majority of the House of Lords, in particular that of Lord Atkin, were susceptible of the interpretation that the negligent infliction of damage or loss upon the person was invariably actionable by that person. Despite the extent of the tort of negligence, however there are still exceptions to this rule, and it is therefore impossible to regard negligence as a universal ground of liability in Tort.

1.8. FOUNDATIONS OF TORTIOUS LIABILITY

There are Two theories with regard to the basic principle of liability in the law of Tort. They are competing each other.

First Theory (Winfield's view) Sir Fredric Pollock was the founder of this theory. All injuries done by one person to another person are torts. If there is some justification, which is recognized by law, it is not a tortious act and there can be no liability.

Everyone must follow the "Good Neighbourhood" principle. In Rylands-vs-Fletcher's case, Rylands did not follow the good neighborhood principle. His act caused damage to his neighbour Fletcher. Fletcher was not able to take coal from his coal-mine. Therefore when fletcher filed a case Rylands was asked to pay damages to his neighbour Fletcher. When Fletcher,

This is based on "First Theory". If I cause injury to my neighbour, he can sue me in Tort. I will be held liable if I cannot prove any lawful justification. Thus it leads to the wider principle that all unjustifiable harm is tortious. This view enables the court to create New Torts and make the defendants liable to pay damages, irrespective of any defect in - the pleadings of the plaintiffs.

This "Theory" resembles the moral saying "My duty is to hurt Nobody by words or deeds. All members of a civilized nation like India are under a general duty towards their "Neighbours" to do them "No hurt" without any lawful cause or excuse.

The precise extent of the "duty" as well as the nature and extent of the recognized exceptions varies according to the nature of "case" in the hand.

"Honest Vivere" is to lead a life free from crime and scandal. Give every man his due. Do not encroach or make unfounded claims on what belongs to others and do whatever one is legally bound to do. "Alterum Non Leader" is to for bear from inflicting unlawful harm. In general, hurt nobody by words or deeds and be "true" and "just" in all your dealings.

The "First Theory" is supported by Pollock and courts have repeatedly extended the domain of the "law of Torts" which were unknown before.

For example:-

1. Negligence became a "New Specific Tort" only by the Nineteenth century.

2. The Doctrine of Absolute liability for the escape of noxious things from one's premises was laid down only in 1868 from the leading case of Rylands-vs-Fletcher.

3. The decisions of the Donoghue-vs-Stevenson (1932) show that the law of Tort is steadily expanding. Refering to the expansion of the law of Tort especially in the field of Negligence, Lord Mac Millan said "The categories of Negligence are never closed".

In **Victoria Park Racing and Recreation Grounds Co Ltd-vs-Taylor (1973) C.L.R. 479** denied the view that wherever damage is caused an action lies unless the defendant can justify an action.

In this case Taylor (defendant) had erected a tower on his land so that he could observe the races on the plaintiff racecourse. Taylor then allowed a broad - casting company to describe the races which was done so effectively that the plaintiff suffered loss through falling attendances. In substance the action was one to protect the right of privacy. The majority of the Judges High court of the held that there was no remedy.

The Second Theory :

"There are definite number of Torts outside which liability in tort does not exist". The second theory resembles the Ten commandments of Moses.

(Space for Hints) According to it, I can cause injury to my neighbour as much as I like without fear of his suing me in Tort provided my conduct does not fall under the frame of assault, deceit, slander or any other nominated tort.

The Law of Tort according to this theory consists of a neat set of "Pigeon holes'" each containing a labelled tort. If the defendants wrong do not fit any of these pigeon - holes he has committed "No Tort".

The second theory is supported by Salmond. He said, "Just as Criminal Law consists of a body of rules established specific offences, so the law of torts consists of a body of rules establishing "specific Injuries".

Neither in the one case nor in the other is there any general principle of liability. Whether I am prosecuted for an alleged offence or sued for an alleged tort it is for my adversary to prove that the case falls in with specific and established rule of liability and not for me to defend myself by proving that it is with in some specific and established rule, justification or excuse.

For Sir John Salmond there was no English law of Tort: there was merely an English "Law of Torts". He bases his conclusion on the fact that under the practice of the early Writs, parties had to go out of courts without getting any damages if their particular injury could not fit in with any of pre-existing types of writs.

Prof. Jenks was also a supporter of this view. But he maintained that acceptance of this view would not make the English judges were able to expand the law through precedents. Precedents were said to be broadening from one to another. Salmond supported his theory by pointing out that in all cases of "Damnum sine injuria", parties were not able to get damages although they had suffered substantial losses.

"Damnum sine Injuria", means damage without injury. Therefore causing damage however substantial to another person is not actionable in law unless there is also a violation of a legal right of the plaintiff. Example - **Gloucester Grammar School Master's** case. In this case the plaintiff a school master, had no right to complain of the opening of a new school near his school. The damage suffered was mere damage without injury.

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"Injuria Sine Damno" (injury without damage)

Just as there are cases in which damage is not actionable as a tort, so conversely there are cases in which an act is actionable as a tort although it has been the cause of no damage at all. **Case law: Ashby -vs- White.**

In this case, the plaintiff was wrongfully prevented from exercising his vote by the defendants, Returning officers in a parliamentary election. The candidate for whom the plaintiff wanted to give his vote had come out successful in the election. Still the plaintiff brought an action claiming damages against the defendants for maliciously preventing him from exercising his statutory right of voting in that election.. The plaintiff was allowed damages by Lord Hoid C.J.saying that there was the infringement of a "legal Right" vested in the plaintiff.

Winfield gives the answer that when it is said that harm is tortious or that anyone who has been harmed by his neighbour can go to a law court with confident of being accorded a remedy. He will recover nothing if he alleges a specific Tort and fails to prove some essential ingredient on its example, if the plaintiff sues for the tort of deceit and cannot prove the deliberate intention to deceive or if he sues for the tort of negligence and cannot prove a duty to take care on the part of the defendant, Dr. Winfield substantially support the broader theory.

In short the underlying question is, Does the Law of torts consists of a fundamental "General Principle" that it is wrongful to cause harm to other persons in the absence of some specific ground of justification or excuse. Does it consist of a number of specific rules prohibiting certain kinds of harmful activity and leaving all the residue outside the sphere of Legal responsibility?

Dr. Winefield is inclined to hold that there is some fundamental basic rule of liability in the growing modern law of tort.

In **Lala Pumalai vs.Kasture Chand Rajni (1945) 2. M.L.J.461,** it is pointed out that there is nothing like an exhaustive classification of torts beyond which courts should not proceed, that new invasion of rights devised by human ingenuity might give rise to new classes of torts and in that way malicious house search may constitute such a new tort.

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On the whole if we are asked to express our opinion between these two theories in the light of the recent decisions of competent courts we will choose the First Broader Theory. which has the support of Dr. Winfield.

Role of the Court

The courts have to find out,

1. Whether any "Right" has been infringed?
2. Whether there has been any "Breach of duty"?
3. Whether any social security is required?

In all above cases, the courts should find whether the defendant is "liable".

1.9. ESSENTIAL CONDITIONS OF LIABILITY IN TORT

1. An act :- An act i.e. wrongful act on the part of the defendant. An omission is also equal to an act.

2. An intention :- Intention is equal to negligence or breach of duty on the part of the defendant - any motive or Malice.

3. Damage :- The result of the defendant's act, which is suffered by the plaintiff and is not too remote, is called damage.

1. An act is any event which is subject to the control of the human will. These acts are either positive or negative it may be an act of commission or an act of omission. A wrong doer either does that act which he ought not to do or leave undone which he ought to do.

   i) If I will fully deceive another by making false representations to him I may be liable for the positive wrong of deceit.

   ii) If I will fully withhold information from another to whom I am duty bound to give information in full I may cause injury to him. Therefore I may be liable to him for my omission to supply him with material information.

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iii) If I am an agent of X and I am deputed to make enquiries with regard to a particular matter and I refrain from communicating to him, the information need for I may be liable for my omission to do my duty.

iv) The owner of a motor car may be held liable for non - insurance of a car which has been statutorily imposed upon him.

A wrongful act is an act contrary to the "Rule of Right and justice". The act complained of should, in the circumstances, be legally wrongful with regard to the complainant. In other words, it must violate some legal right vested in him. The essential of a legal wrong consists in its recognition as a wrong by the law. It is synonymous with injuria; i.e. the violation of a legal right. Legal right is a right enforceable by law. This Right may be Private Right or Public Right.

Private rights comprises of rights which belongs to a particular person to the exclusion of the world at large such rights are:-

1) Right to the safety of the body

2) Right to Reputation

3) Right to property - Movable as well as immovable

4) Other collateral Rights.

They are personal in nature - which enables a person to acquire, enjoy and preserve his property.

5) Security of domestic and contractual relationship.

Any person whose act infringes the private right of another, commits an injury (or wrong)

Public rights comprise of rights which belong to members of the public generally for example,

- Right to take water from a public tank.

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- ❖ Right to take water from a stream.
- ❖ Right of passage along a burial ground.

all fall under this category only.

To illustrate:-

When X trespasses on B's land he has committed a wrongful act.

The wrongful act here is the doing of a positive act by X and injuring a private right of B.

A wrongful act also includes omissions to perform a legal duty. When there is a legal duty to do some act, and a person fails to perform that duty, he renders himself liable in law for such omission. The law of torts exists for the purpose of affording relief in cases of infringement of private and public rights, which are recognized and protected by law.

Example: Glasgow Corporation - vs - Taylor

The plaintiff's son went to a park maintained by the defendants. He picked up and ate poisonous berries thinking that they were cherries and died as a consequence. The park (Botanical Garden) was open to the public. The park was frequently visited by children. The corporations also knew that the berries were poisonous. The corporation was held liable to pay damages when a suit was filed by the plaintiff.

Legal damage:-

In the law of Torts we often use the words - "damage" and "damages" frequently.

The word "Damage" is used to connote injury or lose caused by an invasion of a "person's Legal Right." On the other hand "DAMAGES" means the compensation claimed by the injured person or compensation awarded by the courts for the injury.

In short damage gives rise to TORT - to claim for award of DAMAGES. Not every damage is a damage in the eye of law. There are many acts which though "harmful" are not "wrongful" therefore, not actionable at the instance of the injured party.

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What is then a legal damage? Legal damage is not the same thing as the actual damage. It must be a damage which the law recognizes as such. If an act or omission cause legal injury or is an invasion of a legal right then there is legal damage. If the plaintiff is not able to prove a violation of "Legal right", he cannot succeed merely on the ground of the damage. These principles are usually expressed by the "Latin Maxim" **Damnum sine injuria** (damage without injury), which we have already seen.

Torts are of Two kinds namely:-

1. Those which are actionable Per Se and

2. Those which are actionable only on proof of actual damage resulting from there.

In the First case (Per se) - it includes certain rights and interests which the law considers so important that their violation must be actionable without proof of damage. Thus, when there is an invasion of an "absolute" private right of an individual there is the injuria and the plaintiff's action will succeed even if there is no damnum.

An absolute right is one, the violation of which is actionable per se i.e. without proof of any damage. Injuria sine damno covers such cases and actionable as and when the right is violated even though no damage has occurred. Thus the act of trespass upon another's land is actionable, even though it has not done the plaintiff the slightest harm. Similarly, Libel (defamation in writing is actionable perse).

In the Second kind of Torts, wrongful act causes infringement of qualified right of an individual. Violation of "qualified right" is not actionable "per se". But it is actionable only on proof of actual damage resulting from the violation. For example, proof of special damage is insisted upon in the case of malicious prosecution, Conspiracy, Deceit and Nuisance.

Legal Remedy:-

The third condition of liability for a tort is legal remedy. This means that to constitute a tort the wrongful act must be one for which the remedy is a civil

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action for damage. The essential remedy for a tort is an action for unliquidated damages, although some other remedies are available.

Declaration, or injunction may be obtained in addition to damages or specific restitution in an act for recovery of an article. Legal wrong includes omission as well.

A tort is committed both by an act as well as by an omission as mentioned earlier. A person should not do an act which he is prohibited by law to do and he should not also omit to do that which he is legally bound not to omit. The concept of tort involves the two elements of Right and Duty. It is committed both by infringing a legal right vested in another and by committing a breach of duty owing to another.

For Example:-

(a) A man has to forbear from interfering with another's property. Therefore if he trespasses upon another's land, he commits an act prejudicial to the owner of the land, therefore it is trot.

(b) A driver of a car has a duty to drive his car carefully so as to avoid harm to another, if he drives carelessly and causes injury to another person, he is guilty of omission of a duty, and is liable in an action for a Tort.

Liability for Tort, therefore arises when the wrongful act complained of amounts to either to an infringement of a legal private right or a breach of duty or violation of a Legal duty.

1.10. MENTAL ELEMENT IN TORT

Check Your Progress

6. Write short note on "No Fault Liability."

Mental element of the wrong doer may be one of the following : intention, inadvertence, negligence motive malice etc.

The reasonable man is a man who has got reasons for his activities, a child, pregnant women, lunatics insane persons are not reasonable man according to law. The reasonable man is not a superman, but we all know he is the hero of

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the English law. It is he who furnishes the yardstick by which the conduct of the ordinary man must, in many instances be measured. But the reasonable man is not only the prudent and sensible man, he is also the moral man. It is reasonable for him to act in accord - with proper moral standard and so his actions are both controlled by morals and can be used as a test for morals.

Intention:-

"Intention signifies full advertence in the mind of the defendant to his conduct which is in question and to its consequences together with a desire for those consequences". (Winfield)

When I throw a stone at you with the desire hit should hit you and accordingly it hits you, I have intentionally thrown the stone upon you. Desire for particular consequence is predominant in all intentional acts. But in certain cases law will impute intention upon the parties. In such cases, in point of Law, parties will be deemed to have intended the natural and probable consequences of their acts.

For Example:

If I fire a gun at your dog wishing merely to scare it and in fact some of the pellets hit it, it is not open to me to say that I intended only to scare it and not to hit it. So also if the pellet hit you, who were standing by the side of the dog, I cannot raise the plea of Non-intention. In such cases the law will presume the natural consequences of those acts".

Fitzgerald, J. said in **Sullivan's case** (1868) there "the intentions of men are inferences of reason from their actions where the action can flow but from one motive and be the reasonable result of but one intention".

Glanville Williams said "A man may give way to temptation, despising himself for doing so and wishing that he had the moral strength to resist. Here there were conflicting desire, but he had only single intention - the intention being the desire that accords with conduct. Intention is by definition the desire that prevails and results in action".

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Brain C.J. said, centuries ago, "It is a common knowledge that the thought of a man shall not be tried, for the Devil himself knoweth not the thought of man".

According to Salmond intention means the object or purpose for which act is done. In intention, the wrongdoer has full knowledge of the consequences of his act, which he wants to achieve. It is difficult to know the intention with which the act is done. It is a state of mind. Intention can be determined by the conduct of the person who does an act. Motive and intention are generally used in the same sense, but both differ from each other: firstly - motive is the ulterior object for which an act is done whereas intention is the immediate and apparent object for which that is done. A thief's immediate object may be to steal other's money but his ulterior object may be to purchase food for himself. Secondly, in motive the wrongdoer wishes to get real of imaginary profit for him, but in intention, individual profit may not be the wish of the wrongdoer.

Position of Intention in Tort - Intention is irrelevant in law of tort. If a person is injured by the act of the defendant then he will be liable, even though his intention might not be to cause injury to that person. In law of torts, the liability is determined on the ground that every person knows the natural consequences of his act.

In *Guille V.Swan* (Balloon Case) the defendant flew in a balloon but unfortunately has to embark in the garden of the plaintiff. A huge crowd entered the garden to witness him as a result of which his garden was damaged. The plaintiff sued the defendant for damages. The defendant pleaded that he never intended to harm the plaintiff in such a manner but it happened accidentally. But the Court held that defendant was liable because loss to the plaintiffs garden was the natural consequence of defendant's act as crowd would naturally wish to see the person flying in the balloon. The defendant could foresee the consequence of his act, and it was sufficient that plaintiff had suffered loss.

In *Wilkinson V.Downsfon,* the defendant in a joke told the plaintiff that her husband had broken his legs in an accident and was admitted in a hospital. This shocked her and she got seriously ill. She sued the defendant for damages.

The defendant contended that he never intended to cause any harm to the plaintiff but cut a joke only. But the court held that intention is not an essential element in tort. The defendant knew the natural and probable cosequences of his act which caused the defendant damages and therefore he was liable, whether he intended it or not.

(a) Motive

Motive is that state of human mind which inspires him to do an act. A wrongful act is always the result of an inspiration to do an act.

Motive is the ulterior object of purpose for which any act is done. For example, A steal some property of B. Here the immediate object may be to steal the money or property of B, but the ulterior object may be to buy food for him.

Motive is not an essential element in tort. But is an important element in crime. If an act is lawful then it will not become illegal because it has been done with bad motive. Similarly an act is illegal then it will not be lawful merely because it has been done with good motive. It is the act not the motive for the act, which is regarded essential. In **Allen V. Flood,** (1898 AC) Lord Wastson said:

"Although the rule may be otherwise with regard to crimes, the law of England does not take account motive as constituting an element of civil wrong. Any invasion of the civil right of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences in so far those are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad, or indifferent."

There are some exceptional cases where motive is relevant as an ingredient are torts of malicious prosecution, malicious abuse of process and malicious falsehood. Motive is also relevant in the torts of defamation, nuisances and conspiracy.

(b) Malice

The word "malice" usually means spite or ill-will. But in law the word "malice" has two different meanings: (1) intentional doing of a wrongful act and (2) act done with improper motive. To act maliciously, sometimes means add to

(Space for Hints) do the act intentionally with knowledge that it is wrongful, while at another time it meant to do the act with some improper and wrong motive i.e., some motive of which the law does not approve. Malice in the first sense is synonymous with intention. In the second sense malice means motive and in this sense it includes not only spite or ill-will but any motive which the law disapproves.

The term "malicious" here does not refer to motive or the reason of the act but to the knowledge with which it is committed. A malicious wrong in this sense is different from, and opposed to a negligent wrong and to a wrong committed under non honest though mistaken claim of right. In reference to this class of cases, malice may be defined to be "where any person willfully does an act injurious to another without lawful excuse." In the first sense malice has been defined by *Bayley, J.,* as follows:

"Malice in common parlance means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without any just cause or excuse".

If I give a perfect stranger a blow likely to produce death. I do it out of malice, because I do it intentionally and without just cause or excuse. If I maim cattle without knowing whose they are, if I, poison a fishery without knowing the owner, I do it out of malice, because it is a wrongful act, and done intentionally.

In the second sense, malice means to do an act with wrong and improper motive. Thus malicious prosecution. does not mean the intentional and consciously wrongful prosecution of an innocent man. It means the prosecution inspired by improper motive, that is, the motive which is not allowed and sanctioned by the law. For example, if one person prosecuted somebody only with a view to extort money out of him; he is liable for malicious prosecution. In such a case, even if there was an honest belief in the guilt of the accused, prosecutor may be liable because the prosecution was inspired by bad motive, Le., to extort money from the thief.

Malice is of two kinds

(1) Malice in fact

(2) Malice in law

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'Malice in law' means an act done wrongfully and without reasonable and probable cause. 'Malice in fact' means improper motive. Motive in this sense is relevant in tort of malicious prosecution.

Importance of Malice in law

Malice in the sense of improper motive is entirely irrelevant in the law of tort. It generally looks at the actions of a man. It generally does not ask why he has done this. A good motive will not justify an act which is otherwise illegal. On the other hand, a bad motive will not make an act illegal if it is otherwise legal.

The leading case on this point is the case of **Bradford Corporation V. Pickels.** In this case the defendant made an excavation on his own ground and thus intercepted the underground water which otherwise (if he had not made the excavations) would have flowed into the adjoining reservoir of the plaintiff. The defendant did so with the evil motive to compel the defendants to buy his land at a high price. In Chase More - vs - Richards - it was already settled law that the interception of underground water is not an actionable wrong, even though done intentionally. The House of Lords held that the defendant was not liable. He was making a lawful use of his land. Lord Macnaghten said, "In such a case motives are immaterial. It is the act, not the motive for the act that must be regarded. If the act apart from the motive gives rise merely to damage without legal injury, the motive however reprehensive it may be, will not supply that element."

Exceptions to the rule : In the following cases malice may become relevant in determining the liability in the law of torts -

(1) Malicious Prosecution. - In this case the plaintiff has to prove that the defendant started the prosecution proceeding against him with malice and not for any lawful purpose.

(2) Injuries falsehood.

(3) Defamation - When the defendant takes the plea of qualified privilege, then motive becomes relevant. But when malice is proved then the defence of qualified privilege will not be available to him.

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(4) Malicious conspiracy.

(5) Nuisance.

(c) Negligence:-

Negligence indicates a state i.e. a particular mode of doing some other act. When I drive a car along the public road in a careless manner without taking due care to avoid accidents. I am driving the car carelessly and negligently.

When I publish an article in a newspaper which happens to be defamatory of another person I am careless and negligent with publication. In these circumstances negligence means careless. There is no desire for the consequences and it is this aspect which distinguishes negligence from intention. In the case of wrongful intention, the defendant intends those consequences when he foresees and desires than and therefore does the act in order that they may happen. He is gently negligence. "The careless man is he, who does not care - who is not anxious and not sufficiently anxious that his activities shall not be the cause or loss to others. The willful wrongdoer is he who desire to do harm; the negligent wrongdoer is he who does not sufficiently desire to avoid doing it. Thus negligent and wrongful intent are inconsistence and mutually exclusive states of mind.

Malfeasance, Misfeasance and Non - feasance

The term 'malfeasance' means the commission of an unlawful act such as which are actionable per se and do not require proof of intention or motive. For example if A enters into the garden of B without his permission or consent it amounts to malfeasance. Malfeasance includes wrongs which are actionable per se without proof of negligence or malice.

The term 'malfeasance' connotes the improper doing of some lawful act for example when there is negligence.

A enters a railway compartment without ticket. A Ticket Examiner, B enters the compartment. He demands ticket from A and A cannot produce it. B instead of taking legal action pushes A out of the compartment and he is hurt. B commits misfeasance. The term 'non - feasance' means the omission to do some

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act when there is obligation to perform. The Railway companies are required to keep the platform in good condition and order. If a platform is in a bad condition and a passenger trying to board a train falls down due to unevenness of the platform, the railway company is guilty of non-feasance.

Lord Watson said: "No use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious." Lord Macnaghten has also spoken in the same tone:" in such a case motives are immaterial; it is the act, not the motive for the act that must be regarded. If the act apart from the motive gives rise merely to damages without legal injury, the motive however reprehensible it may be, will not supply that element."

The same principle was again formulated by the House of Lords in the later case of **Allen Vs. Flood, (1898).** The plaintiffs - two shipwrights (persons employed in the construction and repair of ships) were employed by X to do woodwork on a ship. X had already employed some ironworkers. The trade union of the ironworkers objected to X's employment of the plaintiffs because they had previously done iron work in another ship and Allen, a delegate of the union, informed X of this and told him that unless the plaintiffs were dismissed, all the ironworkers would be called out, or strike work. X accordingly discharged them in pursuance of his legal right to do so, for under their contract of employment they were liable to be dismissed at any time. They sued Allen.

The House of Lords held that Allen had done no unlawful act, used no unlawful means in procuring the shipwrights' discharge and that however malicious or bad the motive might have been, his conduct was not actionable. If a man has done what he is justified in doing, the law will not permit an inquiry into his motives. The House of Lords laid down a universal proposition that an act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable to civil action. If a person prosecutes another for a crime which that other has in fact committed, or makes defamatory statements about him which can be proved to be true, it can make no difference that the took malicious pleasure in instituting the prosecution or in publishing the defamatory matter.

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Similarly, a man might lawfully arrest his debtor, though he took maliciously brought up the debtor's bills with a view to procuring his imprisonment. An illustration of this irrelevance of motives is, the right of a land owner to do harm to adjoining properties in certain defined ways by acts done on his own land. He may intercept the access of light to his neighbor's windows, or withdraw by means of excavation the support which his land affords to his neighbor's house or drain away the water which would otherwise supply his neighbor's well. His right to do all these things depends in no way on the motive with which he does them. The law cares nothing whether his acts are inspired by an honest desire to improve his own property or by a malevolent impulse to damage that of others. He may do as he pleases with his own.

This aspect of the law of tort has been criticized as unsatisfactory. Professor Gutteridge has said : "There is a kind of hinterland to our law of torts where the King's writ does not run - a veritable legal Alsatia - in which greed, envy and spitefulness are permitted to reign supreme." Now, if one person willfully destroys his own com or sets fire to his house, there is no legal means to prevent him from doing this act. It is suggested by Winfield that in the case of these abuses of private rights which directly injures the public in general but no one in particular, they should be penalized under general criminal law.

1.11. DEFINITION OF TORT

Winfield's View

In view that redress by an action for unliquidated damages is one sure test of "Tortious Liability" Dr. Winfield has formulated his well – known definition of Tortious liability thus :- "Tortious Liability arises from the breach of a duty primarily fixed by law. This duty is towards persons generally and its breach is redressible by action for unliquidated damages".

Now, Let us analyse this definition. The purpose analysis is to find out its implications.

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(i) Duty primarily fixed by law

These words imply that tortious duties are imposed by the law itself and are not the result of the agreement or consent of persons subjected to them.

Illustrations : I am under a duty not to assault you, not to slander you, nor trespass on your land because I have agreed with you not to do such acts. The emphasis on the duty being primarily fixed by the law distinguishes tortious liability from liability flowing out of contracts which are created by agreements between the parties.

(ii) Towards Persons Generally

The reference here is, of course to the primary duty. i.e, the duty not to trespass not to slander and so on, for breach of which tortuous liability arises. In Winfield's view, if the primary duty is towards a specific person or persons, it cannot arise from tort. In other words, a tort is violation of a 'right in rem'. A right in rem is a right available against the whole world. As opposed to this a 'right in personam' which means a right available against a particular person or group of persons. Thus every person has a right not to be assaulted or defamed. Such a right is available to him not against everybody in general.

Winfield himself admits that in some instances it is hard to say who exactly 'persons generally', yet he considers that the element of generally is an important factor in the definition and that it is sufficiently workable in the majority of cases.

(iii) Action for Unliquidated Damages

As pointed out earlier the remedy by way of an action for unliquidated damages is a suertest of tortious liability. I According to Winfield, the above three are the essential characteristics of a tort.

Criticism of Winfield's View: It is to be noted that Winfield's definition is considered as more informative than precise.

i) Firstly, Tortious liability is said to arise from the breach of a duty i.e., duty of the person liable. However, this principle does not hold good in all

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cases. An important category of tortitous liability is that a master for his servant's torts called vicarious liability (about which we shall study in detail later). Such a liability is imposed on the master though he has not participated in any way in the commission of the tort, nor any duty owed in law by him to the injured is broken.

ii) Secondary, the phrase, towards persons generally is rather vague. As it stands, it does not take in duties arising from certain special relationship as between carrier and passenger or doctor and patient, although passengers and patients have a right of action, in tort against the carrier and doctor owed in certain other special relationships. Such as by a trustee to the beneficiary of the trust or by guardian to his ward. But the duties, of a trustee or of a guardian are not tortuous duties. In the sense that a breach or of a guardian are not tortious duties, in the sense that a breach of such duties do not give rise to liability and so the aggrieved beneficiary cannot take action in tort, though he is entitled to other civil remedies.

iii) It may also be pointed out that an action for unliquidated damages is not the only remedy available for the victim of a tort. Other remedies such as injunction; order for restitution or recovery of possession and declaration are also available in appropriate cases. However, the right to unliquidated damages is the only remedy which is common to all rights of action arising from tortious conduct.

Salmond defines tort as "civil wrong for which the remedy is a common action for unliquidated damages and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation".

It may be seen that this definitions is a formal one intended to distinguish tort from other kinds of civil wrong. It is not a material definition intended to indicate what conduct does and what does not involve a person in the commission of a tort.

Perhaps a comprehensive definition of tort is to be found in Halsbury's 'Laws of England'. It defines rights of action in tort as "those civil rights of action which are available (a) under English common law. (b) for the recovery of unliquidated damages (c) by persons (d) who have sustained injury or loss from

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acts statements (e) or commissions of other breach of duty or contravention of right (f) imposed or conferred by law (g) rather than by agreement".

1.12. SUMMARY

The law of Torts is a division of the common law of England. The expression 'common law' is used in various senses in different contexts. Here it means the case – laws or precedents of the common law courts and is distinguished from statute law or the law enacted by Acts of Parliament. The English law of Torts is mainly based on the case laws but has also been supplemented by some statutes. The English law of torts has been substantially adopted by the courts in the British Dominions and India. The recognition of the law of torts as a division of law in England may be said to dated from 1860 when the first treatise on the subject was published. During the British rule, the courts in India enjoined by Acts of Parliament in the UK and by Indian enactments. These statutes however, directed that disputes relating to marriage, inheritance, succession, caste or religious usage they should be decided according to their personal laws. In regard to suits for damages for torts, courts followed the English Common law insofar as it was consonant with justice, equity and good conscience. India, with an independent judiciary with 'judicial activism' has contributed much to the development of tort law. Developments in the field on absolute liability rule in the M.C. Matha case and the supreme court's directions on multinational Corporation liability is a vibrant example. Recent UPHAR Theatre Fire tragedy case is the good example of the development of the law of torts in India.

1.13. ANSWER TO CHECK YOUR PROGRESS

1. Refer 1.1

2. Refer 1.3

3. Refer 1.4

4. Refer 1.5

5. Refer 1.6

5. Refer 1.10

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1.14. KEYWORDS

Torts	- wrong - defined by court of law.
Damages	- compensation in terms of money
Malice	- ill – will
Damnum	- Damage

1.15. MODEL QUESTIONS

1. Define the term Tort and Explain the nature of tortious liability.
2. Explain the following Maxim laws with cases.
   (a) Ubi Jus ibi remedium
   (b) Solex popule suprema lex
3. "Recent legislation and judicial development show that the criterion of liability in tort is not so much culpability but on whom should the risk fall" – illustrate and explain.

UNIT – 2

GENERAL DEFENCES AND CAPACITY OF PARTIES

INTRODUCTION

We now proceed to discuss the general defences in an actions for torts. Special defences applicable to particular torts. i.e. privilage in an action for defamation, prescription in an action for nuisance.

Many of the important general defences are defined by the Indian Penal Code under the title of 'general defences'. e.g. inevitable Accident, Mistake. etc., The other general defences discussed in this unit are Necessity, consent, etc., As a general rule, persons wronged can take action against wrongdoers and all wrongdoers are liable to be sued. But there are some exceptions recognised in favour of or against abnormal members of the society. Here, therefore we consider the liability of the following special categories of persons. i.e. Foreign and Sovereigns, Ambassadors, etc.

UNIT OBJECTIVES

- To study the General defences under the law of torts.
- To observe the applicability of the legal maxim – (Volenti non fit injuria) in law of Tort.
- To understand the "Act of God" in law of Torts.
- To analyse the capacity of the parties.
- To discuss about the state liability and liability of the Foreign Sovereigns in torts.

UNIT STRUCTURE

2.1 Defences under the law of Torts

2.2 "Volanti non fit injuria"

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2.3 Inevitable Accident

2.4 Act of God

2.5 Necessity

2.6 Mistake

2.7 Private defence

2.8 Statutory Authority

2.9 Liability of the state

2.10 Tortorious liability of Judicial officers and qusi-Judicial Authorities

2.11 Unborn person and Minor status in law of Torts

2.12 Corporations and Unincorporated bodies

2.13 Foreign Sovereigns and ambassadors

2.14 Summary

2.15 Answer to Check you progress

2.16 Key words

2.17 Model questions

2.1. DEFENCES UNDER THE LAW OF TORTS

A Plaintiff, in an action against the defendant for a particular tort, will fail if he does not prove, the necessary ingredients of that tort. Even if he does prove, the defendant may escape liability by taking the plea of some specific defence. Some of these defences are peculiar to particular torts, for example, in an action for defamation, the defences of privilege, fair comment or justification are available. Apart from such specific defences there are some general defences which may be taken against an action in trots. These general defences are 1.Violent non fit injuria 2. Inevitable accident. 3.Act of God. 4. Necessity. 5. Private defence. 6. Statutory authority.

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2.2. VOLENTI NON FIT INJURIA

This maxim had its origin in the process by which Roman Law validated the act of a free citizen selling himself into slavery. In the Nineteenth century it somehow found its way into the law of torts.

The maxim means–what is consented to is not injury, in other words, harm suffered by consent is not actionable. This principle is founded on good consciense and justice. In modern cases, this maxim is most commonly invoked in actions for harm to the person other than to property. If the assent is to the infliction of harm on or to the use of plaintiff's property, such-assent is more usually referred to as 'leave and licence' of the plaintiff.

The maxim has double application. In the first place, this maxim applies to intentional acts, which would otherwise be tortious and in the second place to consent to run the risk of harm which would otherwise be actionable. A patient who has voluntarily entered in a nursing home for an operation cannot sue the doctor for false imprisonment, or the surgeon for battery or for the surgical operation. Since he had expressly assented to these acts. In **Thomas Vs. Quartermaine (1887) 18 Q.B.D.685,** the plaintiff, a workman in the defendants brewery fell in an insufficiently fenced cooling vat at the defendens's brewery and so, was scalded. It was found that both the plaintiff and the defendent knew of the defect. It was held that there was no breach of duty on the part of the defendant employer and the plaintiff could not recover.

In the second place, the maxim applies to consent to run the risk of accidental harm which would otherwise be actionable as due to the negligence of him who caused it. Consent may be express or implied. Such express consent is proved in case where it is given expressly by words as where the plaintiff's contract excludes the defendant from liability for damage caused by negligence or in some other way. Such contracts are construed strictly as against the party claiming the benefit of the exemption and sometimes by certain enactments made in public interest, such terms are declared to be inoperative.

Check Your Progress

1. What is meant by volentinon fir injuries.

Many a time consent may be implied or inferred from the conduct of the parties. If a player in the games of hockey, cricket or football gets hurt in the

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normal course of the game, he cannot complain. If, however, the injury was due to foul play or to a willful assault not incidental to the game, it is an actionable.

In **Hall Vs. Brooklands Auto Racing Club (1933) I.K.B 205** the plaintiff was one of the spectators of a motor race held at Brooklands on a track owned by the defendant company. As a result of collision between two racing cars one of then was thrown among the spectators and the plaintiff was injured thereby. It was held that the plaintiff impliedly took the risk of such injury, the damage being inherent in the sport which any spectator could have foreseen and so the defendent was held not liable.

Spectators in sport events cannot complain if they are struck by balls flying out of the playing area. The reason is that any reasonable spectator could have foreseen such eventualities as might be incidental to the game and had undertaken the risk and when the game was properly organized and played, no one has committed a breach of duty. In **Woolsdrige Vs. Sumner (1963)** the plaintiff who was a spectator in a horse-race was injured by one of the galloping horses. The defendant was held not liable.

In **T.C. Balakrishna Vs. T.R. Subramanyan [A.I.R 1968 Kerala 151]** Kerala High Court rejected the defence of Volenti non fit injuria when the spectator of certain fireworks arranged on a festival day in an open ground was injured by the explosive, which instead of flying into the sky perpendicularly flew at a target into the crowd and burst there.

A trespasser or a thief, who when scaling over a wall at night is hurt by sharp spikes or glass pieces cannot obviously sue the occupier of the premises.

Consent must be free:

For the defence to be available it is necessary to establish that the plaintiff's consent to the act done was free. If the consent of the plaintiff had been obtained by fraud or compulsion or by mistake induced by the defendant it vitiates consent and so cannot serve as a good defence.

Again, a man cannot be said to give a real consent, if he had no freedom of choice in giving or withholding his consent. A servant may be compelled, in

the discharge of his legal duty to his master to run risks for protecting his master's interests, e.g. protecting his master's premises from fire. If in so acting, he is injured he will have a remedy against the person, who was negligent and caused the fire.

Mere knowledge does not imply assent; The maxim is volenti non fit injuria and not scienti non fit injuria. Mere knowledge of an impending wrongful act or of the existence of a wrongfully caused danger, does not in itself amount to consent even though no attempt is made by the plaintiff to prevent or avoid that act or danger. This point is amply borne out by the following cases.

Serch Vs. Blackburn (1830): The plaintiff came to the defendant's premises upon business and bitten by the defendant's dog, which was chained up in the yard. On the paling of the yard was put up a notice "Beware of the dog" pointed in letters three inches long on a board. Held, that as the plaintiff was unable to read, the fact of the notice did not disentitle him to recover.

Users of public places like a highway or a market places though put-on notice of the existence of a danger in that place will not be deprived of the right of action on the ground of volenti non fir injuria, provided their conduct in running the risk was not unreasonable.

The principle of volenti not fit injuria, has been invoked frequently in actions by servants against employers, for negligence but without success.

In **Smith Vs. Baker (1891) A.C. 325,** the plaintiff was employed by the defendant to drill holes in a rock for the purpose of cutting it. A crane was conveying stones from one place to another, swinging round over plaintiff's head without warning. The plaintiff was aware of the danger arising from the practice of omitting to give warning , and so worked for months, when a stone fell on him and injured him. It was held by the House of Lords that the mere fact of the plaintiff having remained on the defendant's service with the knowledge of the dangerous practice did not preclude him from recovering damages.

Yarmouth Vs. France : In this case the plea of consent was not accepted because the plaintiff had represented to his master, the defendant, that the horse which he had been asked to drive was vicious and unfit for the purpose of drive.

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In **Bowater Rowely Regis Borough Council. (1944) K.B. 476,** a cartman was given a horse which known to be an unusually restive temperament for drawing a dust cart. The carter protested against being given that horse, but he was told that he has to take it, and so, he took it. Some weeks later, the horse bolted and he was thrown from his cart and suffered personal injuries. Held, that he could recover damages.

In a Madras case, **South Indian Industrials Vs. Alamelu Ammal (17 Law Weekly 495)** it was held that the defence of consent was not available to an employer, who adopted a risky method of breaking up cast iron by dropping a heavy weight from a great height on pieces of iron resulting in the hitting of a workman by an iron piece and causing his death.

It must be noted that a person employed in a dangerous occupation consents to the risk inherent in that occupation. As Goddard has pointed out in Bowater's case "a horse Carter must take the risk of being thrown or injured by a restive or unbroken horse. It is an ordinary risk of his employment". On similar reasoning we may say, that in India a mahout engaged to train an elephant under his training; so also a ring-master for injuries caused by the animals under his training."

In **Slater Vs.Clay Cross Co. Ltd (1956) 2 K.B. 264** where the plaintiff was lawfully walking about a narrow tunnel on a railway track owened and occupied by defendants. She was struck by a train owing to the negligence of a driver. Denning L.J. said "It seems to me that when this lady walked in the turnnel although it may be said that she voluntarily took the risk of danger from the railway in the ordinary and the accustomed way nevertheless, she did not take the risk of negligence by the driver. Here knowledge of the danger is a factor in contributory negligence, but it is not a bar to the action".

The applicability of this principle has been considered in cases of drunken motorists and guest-passengers. In **Dann Vs. Hamilton (1939) I.K.B. 509,** the plaintiff claimed damages for injuries she had sustained owing to the negligent driving of Hamilton, where she was a passenger in his car. When the plaintiff entered the car, she knew that Hamilton was under the influence of drink.

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Although the driver was drunk, the court held, that the driver was capable of exercising care; and the plaintiff had not consented to his carelessness and was entitled to recover.

RESCUE CASES: The law is that in rescue cases the plea of Volenti non fit injura is not applicable provided the rescue element is proved.

Haynes Vs. Harwood, (1935) I.K.B.146, is a leading authority on this point. In that case, the defendant has left his van attached with two horses unattended in a crowed street. The horses boiled when a boy threw a stone at them. The plaintiff who was a police constable on duty inside a police station, saw that and if nothing was done a woman and a child were in great danger. So he darded out and managed to stop both the horses and save the mother and child but in so doing, he suffered serious personal injuries. Held that he was entitled to damages. The Court observed that the conduct of the plaintiff was not only lawful but highly commendable.

Langendorff Vs. Pennsylvanian Railway Co : Here the plaintiff bravely sprang to save a boy from approaching train but was struck by the train. The judgement against the railway co, was upheld.

In **Culter Vs. United Dairies Ltd (1933) 2 K.B. 97,** the plaintiff went to the assistance of a driver of a horse which had run away into a field. After satisfying himself that his children were safely playing in the garden, he went to the assistance of the driver, who had shouted for help. The plaintiff attempted to hold the horse, but it threw him to the ground causing him injuries, for which he sued the defendants. The Court of Appeal reversing the decision of the court of the first instance, held that even if there was evidence of the risk, and that the plea volenti non fir injuria applied and precluded the plaintiff from recovery since the rescue the element was absent.

In England under Unfair Contract Terms Act, 1977, that the defendant cannot take the plea of volenti non fit injuria or consented to suffer the risk to his person by a contract. Section 2(1) of the Act provides that a person cannot by reference, to any contract term or to a notice given to persons generally, as to

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particular person, exclude or restrict his liability for death or personal injury resulting from negligence.

2.3. INEVITABLE ACCIDENT

The plea of inevitable accident is that the consequences complained of as a wrong were not intended by the defendant and could not have been foreseen and prevented by the exercise of ordinary caution and skill. 1. The leading case on the point is the **Nitroglycerine Case** (1872). The facts are: the defendants, a firm of carrier received a wooden case for being carried from one place to another. At an intermediate station it was found that the contents were leaking. The case was being opened, Nitroglycerine exploded and the office building belonging to the plaintiff (landlord of the defendants) was damaged. An action was brought by the plaintiff-owner of the building-for damage caused to his building by the explosion. The plea of inevitable accident was accepted because (1) the fact that the wooden case contained nitroglycerine was not made known to carrier (2) The properties of nitroglycerine was also not well known to the public.

Brown Vs. Kendal, (1850) in this case the plaintiff's and the defendant's dogs were fighting. The defendant was beating them with a view to separate them and the plaintiff was looking on. The defendant while retreating backwards, accidentally hit the plaintiff in his eye, causing him a severe injury. In an action brought by the plaintiff it was held that the action of the defendant was a lawful and proper act in itself, which he might do by proper and safe means; and that if, in doing this act, he accidentally hit the plaintiff and wounded him, it was the result of pure accident and therefore no action would lie.

Check Your Progress

2. Write short note on – Inevitable Accident.

It is to be noted that in actions, where liability of the defendant arises on proof of negligence, the plea of inevitable accident will be a good defence. Such a plea will tantamount to saying that he defendant has not failed to observe the standard of care required of him. Thus, in **Holms Vs. Mather (1875) L.R. 10Ex 261,** the defendant's horses while being driven by his servant on a public highway, startled by the barking of a dog and became so unmanageable that the

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servant could not stop them, but could to some extent, guide them, while unsuccessfully trying to him to a corner safety, they knocked down the plaintiff. **Bramwell, J.** observed that "for the convenience of mankind in carrying on the affairs of life people as they go along roads must expect, or put up with such mischief as reasonable care on the part of others cannot avoid". So, the defendant was held not liable.

In the case of **Stanley Vs. Powell (1981) I.Q.B.16,** the defendant whilst firing at a bird, accidentally and without negligence shot the plaintiff, who was employed to carry cartridges for a shooting party with a bullet, which glanced off from a tree. It was held that injury was accidental and the plaintiff was not liable. In referring to this decision, Salmond in his "Law of Torts" expresses the view that the case might have been decided on the ground that the inability of the defendant was based on inevitable accident.

In respect of those torts, where liability arises independently of any fault on the part of defendant based on strict liability imposed by the rule in **Ryland Vs. Fletcher,** inevitable accident is no defence.

2.4. ACT OF GOD

The defence based on "Act of God" closely resembles the defence of inevitable accident, and is a product of strict liability. In the case of inevitable accident, the cause of the loss or injury arises out of the working of natural force alone which is outside human agency and could not reasonably be anticipated. The phrase "Act of God" was defined in **Nugent V. Smith (1876)** as "an accident that is due to natural causes directly and exclusively without human intervention and that could not be prevented or averted by the exercise of reasonable care." In that case, a ship owner was sued for the loss of plaintiffs mare, which being shaken during a strong gale, got so frightened that it struggled and hurt itself and died. He was held not liable because the damage was due to an act of God and also the inherent vice of the mare. The above definitions make it clear that all natural agencies, as distinct from human activity, constitutes acts of God. Whether a particular occurrence amounts to act of God is a question of fact. The violence with which the

Check Your Progress

3. Explain the defence of Act of God.

(Space for Hints) phenomenon occurred or rarity of the events is relevant only in considering whether it could or it could not have been foreseen and prevented by reasonable care; if it could not, then, it is an act of God which relieved the defendant from liability.

Act of God is a defence to the rule of strict liability laid down in the case of **Rylands Vs. Fletcher** but it must be remembered that as pointed out earlier inevitable accident will not serve as a defence to the rule of strict liability. In the leading case of **Nichols Vs. Marsland (1876)** the defendant had certain artificial pools on his land. The embankments and let-outs of the pools had been constructed without negligence and were adequate for all ordinary occasions. A very violent storm, however described by the witness as "the heaviest within human memory" broke down the embankments with the result water rushing out of the polls carried away four country bridges, in respect of which damage, the action was brought. It was held that the defendant was not liable in as much as the water had escaped by the act of God.

Under the category of acts of God, will come storm, tempest, lighting extraordinary fall of rain, extraordinary high tide, extraordinary severe frost or a tidal bore, which sweeps a ship in mid water.

The tendency of the court nowadays is to restrict the ambit of the defence on this plea of Act of God. This restriction is not because strict liability is considered desirable but because increased knowledge limits the unpredictable. In **Greenock Corporation Vs. Caledonian Railway (1917) A.C. 556,** the House of Lords refused to extend the principle in **Nichols Vs. Marsland** to the facts of the case. The Corporation in leaving out a park constructed a concrete paddling pool for children in the bed of a stream, thereby altered its course and obstructed the natural flow of water. Owing to rain fall of extraordinary violence, the stream over flowed at the pond, and a great volume of water, which would normally have been safely carried by stream, poured down public street into the town and flooded the property of the plaintiff – Railway Company. The House of Lords held the Corporation were liable. Nichol's case was distinguished on the ground that the injury to the plaintiff's property was the result of defendant's interference

with the natural stream and his failure to provide against even an extraordinary rainfall.

In State of Mysore V. Ramachandra (1970) 73 Bombay L.R 723, State Government erected a reservoir adjoining the plaintiff's land in order to provide drinking water facilities to a nearby village. An outlet was constructed to let out surplus water, but it was inadequate. Due to very heavy rainfall, the water from the reservoir overflowed into the outlet and thereafter over the plaintiff's land causing damage to his land and crops. In a suit by the plaintiff, the plea of Act of God by the State was rejected and the Government was held liable.

In **S. Vendantacharya Vs. Highway Department,** South Arcot, on 14th Nov.1960, when a Bus was passing through culvert fell into the stream, and the passenger travelling in the bus he was died. The legal representatives filed claim application, the Defence was that there were very heavy rains during the last 15 days, resulting in the breach of nearby lake and the water entered the culvert with terrible velocity and damaged the culvert. The defence of act of God was pleaded. The Supreme Court overruled the decision of the Madras High Court and held that Highway Department was liable because, making suitable provision for strengthening the culvert and Bridges against Heavy rain and flood which can be anticipated, was their duty and by not performing their duty, they were liable for negligence.

Thus you will note that how the plea of Act of Act is restricted.

2.5. NECESSITY

An act causing damage if under necessity to prevent greater evil is not actionable eventhough harm was caused intentionally. Necessity should be distinguished from private defence. In the former. there in an infliction of harm on innocent plaintiff where as is the latter harm is caused to a plaintiff, who is prima facie a wrongdoer. Again it is also different from inevitable accident in that defence of necessity is raised to escape liability for harm intentionally caused by the defendant while the plea of inevitable accident is raised to escape liability from harm, not intended by defendant, but it is caused inspite of the best efforts to avoid it.

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The basis for accepting necessity as a defence is the maintenance of public good and self-protection. Act done in exercise of duties of military authority in times of war or rebellion may also be covered by this defence. If in the course of medical or surgical treatment to which the patient's consent had been obtained, there arises suddenly an emergency, being the patient's life at risk, the degree of necessity may obviate a need to obtain consent for further treatment. If it is particularly of the same character. Similarly, if a house is on fire you can enter the house and remove the goods' to save them, or pull down the house, to prevent the spreading of fire to other house. Thus in **Cope Vs. Sharp (1912) 1.K.B. 496,** the defendant committed certain acts of trespass on the plaintiff's land in order to prevent the spread of fire to land over which the defendant's master had shooting rights. It was held that the risk to his master's property having been imminent, the defendant had acted as a reasonable person in the circumstances and so, was not liable.

Thus a boat's man in the mid ocean caught up in a heavy storm may throw over board a few bags of cargo to save the passengers in the boat or to save the boat. In **Gregson Vs.Gibert,** the captain who threw into sea 150 negro slaves for there was shortage of drinking water was held unjustifiable and was held liable.

The defence of necessity is not in general favoured by the courts. In a recent case Lord Devlin has observed. "The Good Samaritan is a character unesteemed by the English Law".

London Borough of South wark vs. Williams (1971) 2 All.E.R. 175. In this case a curious plea of sheer necessity was raised which was rejected by the court of Appeal. Lord Denning said, "If, houselessness were once admitted as a defence to trespass, no one's house would be safe. Necessity would open door which no man could shut".

Check Your Progress

4. "Necessity knowns no law" – Explain.

2.6. MISTAKE

The defence of mistake can be distinguished from the defence of inevitable accident. In the plea of mistake, there is an admission that the act and

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its consequences were intended but that the defendant acted under an erroneous belief formed on reasonable grounds that some circumstances existed which justified him. The Plea of inevitable accident is that the consequences complained of as a wrong were not intended by the defendant and could not have been foreseen and could not have been avoided by the exercise of reasonable care and skill.

Mistake may be either of law or of fact. Mistake of law is generally no defence to civil or criminal liability. There is a well known maxim **"Ignorantia juris non excusat"** which means that ignorance of law is no excuse. Every man is presumed to know the law of his land and if an individual infringes it through ignorance, he will nevertheless be held liable for the consequences of his error. This maxim is applicable to the law of tort as well.

In **Hollins Vs. Fowler, (1875) L.R. 7 L.757** an auctioneer, who innocently sold A's goods in the honest and reasonable belief that the goods belonged to B, on whose instructions he sold them was held liable to A in conversion. Similarly if your cut the grass on your land, it is no defence to say that I was under the mistaken impression that it was mine.

In **Morrison Vs. Ritche,** the proprietor of a newspaper was held liable for having erroneously published a statement, believing it to be true, that the plaintiff had given birth to twins, whereas she had been married a month before.

Nevertheless mistake is a defence; (1) mistaken prosecution of an innocent person; (2) mistaken arrest of innocent person on suspicion felony; (3) Mistaken but honest statement on privileged occasion.

2.7. PRIVATE DEFENCE

Every person has a right to defend his own person and property. This right extends to protection of one's spouse and family also. The word 'defence' implies some sort of attack on the defendant usually by the plaintiff, who is in the wrong himself. Some authorities regard private defence as a species of self help, i.e. as one of the remedies for tort. Certainly, what begins as self-defence often ends in self-help.

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Force employed must not be out of proportion to the apparent harm which is threatened and has to be warded off. The person acting on the defense is entitled to use as much force as he reasonably believes to be necessary. The test is whether the act was such as he might reasonably, in the circumstances, consider necessary for the prevention of harm, which he was about to suffer. On the one hand, one is not bound to wait until a threatened blow falls before he can hit in self-defence, but on the other hand, not every threat will justify a below in self defence, still less can B be excused "if upon a little below given by A to B gives him a blow which maims him".

Every person is entitled to protect his property. But actual possession (whether with a good titled or not) or the right to possession is necessary to justify force in keeping out or expelling a trespasser.

The right of a person to protect his extends to taking such measures as may be reasonable necessary for the purpose. Fixing of broken pieces of glass spikes on a wall or keeping a fierce dog can be justified, but not the fixing of spring guns. In **Bird Vs. Holbrook (1828)** the defendant had put up spring guns in his garden without fixing any notice about the same, and a trespasser, the plaintiff, was seriously injured by its automatic discharge. Court held that the plaintiff was entitled to recover compensation as the force used here was greater than the occasion demanded.

In **Morris Vs. Nugent, (1839) 7C & P 572,** the facts were: The defendant was passing by the plaintiffs house, when the plaintiff's dog ran out and bit the defendant's cloth covering his ankle. On the defendant turning round and raising his gun the dog ran away. In an action by the plaintiff, the court held that the defendant was not justified in so doing to justify shooting the dog, it must be actually attacking the party at the time.

In Crosswell Vs. Sirl, (1948) 1 K.B. 211, where the defendant shot the plaitiffs dog which was trespassing and attacking sheep and pigs, the Court of Appeal laid down that to succeed in his defence, it must be proved (a) that the dog was worrying or about to worry the livestock and there was no other reasonable means of ending or preventing the worrying (b) that the dog had not left the vicinity and was not under the control of any person.

2.8. STATUATORY AUTHORITY

When a statute authorized the commission of an act. which would otherwise be unlawful and actionable as a tort, no action would lie for injury caused thereby. This principle applies to any tort, but it is frequently invoked in actions of nuisance. But Winfield points out "statutory powers are not however, characters of immunity for any injurious act done in the exercise of them".

The law on this aspect was developed in the early stages in litigations upon the Victorian Act of Parliament enabling the construction of Railways. In conferring statutory powers under such enactments, Parliament must have intended to safeguard then development of railways and to prevent their progress being impleaded by action for nuisance. In such action the court construed the powers favorable to the railway companies so that the progress of railway work may not be arrested. The statutory authority confers statutory indemnity also. The authority and indemnity extend not merely to the act itself but also to all its necessary consequences, for otherwise, the authority to do the act is not of much use.

The immunity of a railway, which were constructed under statutory powers, against liability for fires caused by sparks escaping from locomotives came up for decision in **Vaughan Vs. Toff Vale Rail Co (1806) 5 H & N 679**, where the defendant railway had taken every precaution that science could suggest to prevent injury of this sort. It was held that as Parliament had authorized use of locomotive, it was not consistent with the policy and justice that the defendant, in the absence of any negligence, should be liable.

On this principle, the occupiers of houses adjoining a railway working under statutory powers, cannot complain, in the absence of negligence on the part of the railway, of nuisance, value, vibration by of passing of trains or noises of railway traffic. **In Hammersmith Rail Co, Vs. Brand (1869) L.R. 4 H.L.** 171, the sale-value of the plaintiff's property was considerably depreciated due to the noise, vibration and smoke caused by the running of trains on a railway constructed under statutory powers. The damage being necessarily incidental to the running of trains authorized by the statute, it was held that no action lie for the same.

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In case where statutory authority is pleaded in defence, we must distinguish between two types namely. (1) absolute statutory authority i.e. authority to do the act notwithstanding nuisance or other injury caused to the plaintiff, (2) conditional authority i.e., authority to do the act provided it, can be done without causing such consequences.

Whether the authority is absolute or conditional it is to be ascertained from the express provisions of the particular statute or had to be implied from its general provision. An illustrative case for absolute or imperative authority is **Mohammed Moiden Saity Vs. Madras Corporation (1905)** the Madras City Municipal Act required that the "commissioners shall provide a sufficient number of convenient places for burial and burning grounds within or without the city and may acquire land for the purpose". It was held that in view of the imperative language used, the provision of compulsory power of acquisition and compensation for damage done in the exercise of their powers, they were not at all liable for choosing a particular place notwithstanding the resulting nuisance to the plaintiff.

In **London and Brighton Railway Co. Vs. Trumon (1815)** a railway company was by their Act authorized to carry cattle and purchase land by agreement. In addition to it they were empowered to purchase compulsorily any land not exceeding 50 acres in such place as should be deemed eligible for the purpose of providing yards for receiving or keeping the cattle transported by the railway. The Act contained no provision for compensation in respect of lands purchased by agreement. The company was held not liable for a nuisance arising from the cattle yard. The prohibition in the Act was interpreted to be an imperative one conferring on them absolute immunity from all sorts of liability.

Metropolition Asyhum District Vs. Hill (1881) 6 A.C. 193 would illustrate conditional authority. In this case a local authority, had statutory authority to erect a smallpox hospital. It was restrained from erecting one in a place in which it would have been a source of danger to the residents of the neighborhood. This statutory authority was considered by the court as a conditional authority. They could have obtained a suitable site where no nuisance would result, to the neighbourhood if they erect a small pox hospital.

2.9. LIABILITY OF THE STATE

Capacity signifies the competency of the parties to sue and their liability to be sued. The general rule is that one who suffers an injury by the wrongful act of another can sue him except in case of certain person who are deprived of this right by law. Similarly certain persons are either not liable for their torts or immune from legal liability.

In course of time it was found that since the King had become one of the largest employer of labour, contractor and occupier of property in the country, adequate provision should be made to provide compensation for the victims of torts committed by the King's servants in the course of their employment. With this object, in England a statute had been passed by the parliament known as the **Crown Proceedings Act 1947.**

Under this Act, the old maxim that **"the King can do no wrong"** is retained to extend that no proceedings can be instituted against the Sovereign in person and there are savings in respect of the Crown's prerogative and statutory powers. But otherwise the general effect of the Act is to equate the Crown (King) with a private person of full age and capacity for the purpose of tortious liability. Section 2(1) provides that the Crown shall be liable as if it were such a person; (a) in respect of torts committed by its servants or agents; (b) in respect of any breach of duties which a person owes to is servants or agents at common law by reason of being their employer and (c) in respect of any breach of duties attaching at common law to the ownership, occupation, possession or control property. Liability in tort also extends by the Crown of a statutory duty. The law as to indemnity and contribution as between joint tortfeasors shall be enforceable by or against the Crown and the **Law Reform (Contributory Negligence) Act, 1945** binds the Crown.

Indian Law

Unlike the Crown Proceeding Act 1947 of England, in India we have no statutory provision with respect to the liability of the State in India. Article 300 of the Constitution provides that the Union of Indian and the Government of the States are Juristic persons and can sue and be sued, but does not mention the

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circumstances under which that can be done. The only thing that it says is that the liability of the State is same as it was before the Constitution.

Before the Constitution, the position was governed by the **Government of India Act, 1935,** which also contained a similar provision. It was enacted that the state (then the Federation and the Provinces) could "sue and be sued in the relation to their respective affairs in the like cases as the Secretary of State in council might have sued or been sued as if this Act had not been passed". We have, therefore, to find out, in what circumstances the Secretary for India in Council could have been sued.

The important case in which this aspect is considered is that **of P & O Steam Navigation Company Vs. The Secretary of State for India in Council (1871).** In this case the plaintiff's horse was injured when a funnel carried by some servants of the East India Company, employed in their dockyard in the Hoogly fell on the animal due to the negligent handling by they Company's servants. The Supreme Court, Calcutta, found the East India Company liable for the tortious act of its servants. The defence that the Company could not be sued in its own courts was rejected. The English rule of Crown's immunity was held inapplicable since the Company was not a Sovereign body in itself. It performed two types of functions; (1) Sovereign (2) Non-Sovereign functions. When it exercised Sovereign functions, it could claim immunity from tortious liability; otherwise not. The maintenance of a dockyard was held to be non - sovereign function but a commercial activity and so, the Company was held liable.

In **Secretary of state for India Vs. Cockraft (1914)** it was held that the maintenance of a military road in Malabar was an exercise of sovereign function and the secretary of State was not liable for damages for injuries sustained in a carriage accident due to negligent stacking of gravel on the road.

State of Rajasthan Vs. Vidhyawati (AIR 1962 SC. 933) In this case the driver of a jeep car owned by the Government and maintained for the use of a Collector's bungalow by his rash and negligent driving knocked down and severely injured a pedestrian who later died. Where upon, the widow sued the Government for damages for the negligence of the jeep car driver. The Supreme Court, rejecting the plea of sovereign immunity set up

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by the state relying on P&O. Steam Navigation Company's Case, held the state liable vicariously for the tort committed by its servant (the jeep driver). Sinha C.J. rejecting the plea based on the maxim that the "King can do no wrong" observed: In India, ever since the time of the East India Company the sovereign had been held liable to be sued in tort or in contract and the common law immunity never operated in India. Now, that we have by our Constitution, established of a Republican form of Government and one of the objectives is to establish a socialistic State with its varied and other activities, employing large army of servants, there is no justification in principle or in public interest that the state should not be held liable vicariously for the tortious acts of its servants."

Two years later came the decision of the Supreme Court in **Kasturi Lal Vs. State of U.P. (AIR 1965 SC 1039)** holding the state not liable for a tort committed by a Government servant one ground that his official duty fell under the category of exercise of sovereign function of the state. The appellant, carrying some gold sale for in the Meerut Market, was taken to custody at midnight on suspicion by Police authorities believing the valuable to be stolen seized them from him kept the same in a box locked and kept it in the Malkhana pending disposal of the case. The appellant was released later for no case of theft was established against him. But the gold seized from him could not be returned to him for the Head Constable in charge misappropriate the same and absconded to Pakistan and action taken to trace him ended in vain. On a suit filed by the appellant, the trail court decreed the appeal and ultimately to the Supreme court.

The question before the supreme court was whether the State Government was liable to compensate, the appellant for the loss caused by the negligence of its servants. It was argued on behalf of the State that it was not liable for the loss was occasioned to the appellant while the state was engaged in the execution of a sovereign function. The court accepted this contention and held that the Government was not liable as the function involved was a sovereign activity. The court relied on the observation : "There is a great and clear distinction between acts done in the conduct of undertaking as which might be carried on by private individuals without having such powers delegated to them" made by

(Space for Hints) Chief Justice Peacock and affirmed the distinction between sovereign and non-sovereign functions. The court held that if the tortious act committed by the public servant is in discharge of his statutory functions referable to and ultimately based on the delegation of the sovereign power of the state to such public servant an action will lie for damages for loss caused by such tortious act. The court distinguished the facts of this case from **Vidyawati's** case. The court took the view that negligent act in driving the jeep car from the workshop to the Collector's bungalows for the Collector's use could not claim such a status. In fact, the employment of a driver the jeep car for the use of a civil servant itself an activity which is not connected in any manner with the sovereign power of the State at all. That is the basis on which the decision must be deemed to have founded".

The decision of the Supreme Court in Kasturi Lal's Case has been subject of criticism for the unfortunate consequence it has produced, for under the law rightly declared in Vidyawat's case a citizen would have had remedy against the state or for the act committed by its servant.

In the case of **Nagendra Rao and Company Vs. State of Andhra Pradesh 1994 (6) SCC. 205,** Goods have been confiscated from the plaintiff, Nagendra Rao under sec. 6-A of the Essential Commodities Act, 1955. Later Collector, ordered to return the goods as seizure was illegal. But when the plaintiff went to take back the goods, found that the goods were not found to be of the same quality and quantity which were there at the time of confiscation. The owner of the goods refused to take delivery and filed suit claming value of the goods as compensation. The High Court of Andhra Pradesh held, the Government is not vicariously liable, but the Supreme Court held, the Government was vicariously liable. Hence on the basis of this ruling – Kasturilal's case has become insignificant.

Further in the case of **Thangarajan Vs. Union of India (AIR 1975 Mad, 32)** Military Truck was conveying gas from the Factory to ship INS Jamuna when the Military Truck on its way, by rash and negligent driving of the truck driver, a boy aged 13 was hit by military truck and injured. When the boy

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claimed compensation it was held, military truck and conveyance was under sovereign function and hence the Union of India was not liable.

But latter in **Puspha Thakur Vs Union of India (1994 ACJ, 559 S.C)**, in where a military truck coming from the side of Delhi, due to negligence went on the wrong side of the road, and hit a culvert. The Appellant and four other persons sitting on the Culvert sustained severe injuries. The Truck was part of the First Armed Division, which had moved to Ferozopur during the 1971 Indo-Pak War. After the end of the War the division was ordered to move back to its permanent position at Jhansi. It was during this movement the accident occured. At the time the truck was carrying ration and some soldiers. The Delhi High Court held that, it was in the exercise of sovereign function but the Supreme Court overruled and held it as non-sovereign functions and the Union of India was held liable.

Hence, socio-economic welfare activities undertaken by the Government, the function will not be called as sovereign function generally. But the latest trend that the distinction between sovereign and non-sovereign function is fast diminishing and the Government is held liable invariably.

Act of State

Act of State means, act of the executive of the State performed as a matter of policy in the course of its relations with another state or another states subject unless they are temporarily within the allegiance of that state.

Act of one State against another state or act of one State against another State's citizen is Act of State. When the Act or injury caused is of Act of State policy, who did the Act is not liable to compensate the loss.

The well known case is **Buran Vs. Denman** (1848) and the fact is that Spanish citizen put up slave baracons at the west coast of Africa. British Royal Navy Captain, who came there, released all the salves and set fire to the Tents. Spanish citizen filed suit for damages against British Government. The Government held that Act of one State against another State's citizen, i.e., Spanish citizen, the suit is not maintainable on the basis of Act of State policy.

Check Your Progress

5. What is Act of State?

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In another case **Krajina Vs. Tass Agency (1949) 2 All. E.R 274.** The fact is that, Tass Agency is part of the publication Department of Soviet Russia and Tass Agency in London, publishing magazine Soviet Monitor. In the magazine an article was published about the plaintiff London citizen defamatory. Hence the plaintiff filed a suit for damages against Soviet Russia. The Court held that the Soviet Government was not liable as the act was Act of State.

As pointed out earlier, there is no such thing as an Act of State between a sovereign and its own subjects. This principle is pointed out in **Hardial Singh Vs. State of Pepsu (1960).** The Ruler of Naba made a grant of some property to the appellant Hardial Singh. The State of Naba subsequently came to be merged in Patiala and the East Punjab Union (Pepsu). The State of Pepsu which was formed on Aug. 20, 1948 repudiated the grant of property to Hardial Singh. In an action challenging repudiation, the defence of Act of State was taken. The Punjab High Court rejected the defence of Act of State holding that when different states are merger and the New State of Pepsu, come into existence by such merges on Aug 20, 1948 all these citizens of the covenanting states had become the citizen of Pepsu on that date, and the act of repudiation of grant in 1952 was an Act as regards its own citizens for which plea of act of State was not available.

2.10. TORTIOUS LIABILITY OF JUDICIAL OFFICERS AND QUASI - JUDICIAL AUTHORITIES :

Judicial Officers

The general rule is that no action lies, for act done or words spoken, by a Judge in exercise of his judicial office although his motive is malicious. And act or words are not done or spoken in the honest exercise of his office. Otherwise the Administration of Justice would lack one of its essentials, the independence of the Judges. The reason for the above rule is that it is thought better that corrupt or malicious Judges, should be protected than that honest Judges should be exposed, to the risk of frivolous and vexatious proceedings. This protection is given to not only to superior court Judges but also inferior court Judges.

In India to protect the Judicial Officers, **Judicial Officers Protection Act 1850** has been passed. Section 1 of the Act reads as : No Judge, Magistrate,

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Justice of the peace, Collector or other persons acting judicially, shall be liable to be sued in any Civil Court for an act done, or ordered to be done, by him in the discharge of his judicial duties whether or not within the limits of his jurisdiction. The sections give protection only to act done in discharging judicial duties.

If the Magistrate is discharging executive or Administrative function and causing harm or injury, the Magistrate may be liable to compensate the loss. In the case of **State of U.P. Vs. Tulsi Ram (AIR 1971 Allahabad)** a Judicial Magistrate while complying with a High Court order, wrongly arrested acquitted persons. The mistake was detected within a few hours, and the Plaintiffs were released. They claimed damages a sum of Rs.2,000/- for humiliation, disgrace, physical discomfort and mental suffering. Section 1 of Judicial officers Protection Act was held to afford, no protection to the Judicial Officer and he was directed to pay damages (sum of Rs.500/-).

If the Magistrate acts without or absence or excess of jurisdiction the Magistrate was held liable for damages. When the Magistrate, acting malafide illegally and outside his jurisdiction, ordered the arrest of the plaintiff, the Patna High Court in the case **Sailaj Fande Vs. Suresh Chandra Gupta** held, he was not entitled to the protection given under Judicial Officers Protection Act 1850.

QUASI-JUDICIAL ACTS: The protection afforded in respect of judicial act is available to acts of bodies like universities, college committees, Inns of Court, and clubs which exercise quasi-judicial powers. Persons enjoying quasi-judicial powers are protected from civil liability if they observe the rules of natural justice and the particular statutory or conventional rules which may prescribe their course of action.

Miss Shibani Bose v. Banerjee (1952): In this case the Calcutta High Court refused to interfere with disciplinary action taken by the Principal of the University Law College in expelling the Student for certain conduct, namely, sat with male students and refused to sit with other lady students.

2.11. UNBORN PERSON AND MINORS – THEIR RIGHTS

Unborn Persons : The question is whether unborn children have any, right in law. What is their capacity to sue for injuries suffered "En ventre sa mere" (child in the womb).

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The law of property recognizes the rights in favour of a child in the womb. Property can be bequeathed in favour of a child. So also trusts may be validly created for the benefit of unborn children, who are to come into existence in future. According to Hindu law, a child in the womb is entitled to a share in the family properties, if family properties had been partitioned without taking into account the child in the womb and on birth it is a male child the partition is liable to be reopened and a share allotted to the minor male child.

In criminal law, injury to child is made an offence punishable with imprisonment or fine or both. It is a penal offence to cause death to an unborn child in the womb or to cause abortion or miscarriage.

Montreal Tramway co. Vs. Leveille : In this case, mother while getting down from a tram car was injured due to the negligence of the driver. At the time of the accident. She was 7 months pregnant. Two months later she gave birth to a child with a distorted Feet. In an action brought against the tramway company no explanation was offered for the club feet excepting the fall of the mother. The Supreme Court of Canada allowed the claim for $5500 and observed "if a right of action on its own part to go throughout life carrying the seal of another's adult and bearing a very heavy burden of infirmity and inconvenience without any compensation therefore".

In Walker Vs. G.N. Railway Co: A child was born crippled and deformed after an accident to it en venture sa mere owing to negligence of the company. In a claim for prenatal injuries the company was not held liable on the fear that if such (act were allowed a child might sue its own mother for having impaired its health by being careless of her own. In a U.S. case **Smith v. Luckhardt** the court preferred the ruling in **Walker's case**.

Check Your Progress

6. What are the rights of unborn person?

In Ireland the Civil Liability Act, 1961 section, 58 provide that the law relating to wrongs shall apply to an unborn child for his protections in like manner as if the child was born. In England the Law Commission has proposed an enactment of a similar nature creating liability for injury to an unborn child. In India, there is no authority on this aspect. In principle there seems to be no reason why an action should not be brought by a child in respect of such injury provided that the necessary elements of a tort can be proved.

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MINOR: A minor is liable for his torts in the same manner and to the same extent as adult; infancy per se is no defence to an action for tort.

Infants are liable for wrong of omission as well wrongs of commission they have been held liable for assault, false imprisonment, libel, slander, and seduction, and trespass, wrongful detention of goods, fraud and embezzling money. Where negligence is concerned no exception has been made, nuisance and injuries to neighbours from negligent use of their property is a ground of liability from which a minor has not been always able to escape.

In certain other branches of law, liability is excluded by the fact that the defendant is below a certain age. In India, in criminal law a child below seven years is incapable of committing an offence and a child above seven and below twelve years of age is not guilty of a crime, if he has not attained sufficient maturity of understanding to judge the nature and consequence of his conduct. In the law of Contracts, a minor is incapable of being a party to a contract and cannot be sued for a breach of contract.

In **Govely Vs. Codd (1967) 1 W.L.R. 19,** a boy of 16 and a half years young was found to have been negligent in the use of air-rifle and to have shot accidentally the plaintiff. It was held that he was liable.

Where, however, the minor is very young, then his age is relevant, if he is sued for a tort where intention, knowledge, malice, or other condition of the mind of the wrong doer forms an essential element of the wrong. As the young may well be incapable of the necessary mental state for liability in such torts extreme youth may afford a defence.

On the same principle in cases of negligence, before an infant can be made liable it must be clearly shown that the child failed to show the amount of care which may reasonably be expected from a child of that age. In the case of **Walmsley Vs. Humenick (1954)** two little boys aged 5 years were playing "Cowboys and Indians". One boy was hurt in the eye by an arrow let fly from a bow, by the other. The court held that the arrow was not let fly from a bow, aimed at the plaintiff even though it might amount to negligence if they were adults. Here, the infant defendant cannot be held liable.

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In the following cases an action against a Minor for a tort may not be sustainable: 1. in case of defamation the youth of the defame though pre se no excuse may disprove an injurious tendency of his words, as reasonable men may disprove an injurious tendency of his words, as reasonable men may not take them seriously. 2. In case of deceit and 3. where the act of minor is both a tort and breach of contract, the minor cannot be sued in tort for that act. This is on the principle that in general contracts entered into by minors are unenforceable and so, if he were allowed to be sued in tort for that act it would mean an indirect enforcement of a contract. Thus in **R.Leslie v. Shiell**, (1914) a minor had fraudulently told the plaintiff that he was of full age and thereby persuaded them to lend him money. He was held not liable for deceit or on any other ground for a judgment against him would have amounted to the enforcement of the contract of loan in an indirect way.

In **Jennings, Vs. Rundall (1799)** the plaintiff sued for injury to a mare, which the defendant, a minor, hired for riding in the course of the journey the mare was strained and injured. It was held that this was in substance an action for a breach of contract and could not be altered by the mere allegation that the defendant acted wrongfully or maliciously. Thus you cannot convert a contract into a tort to enable you to sue an infant.

On the other hand if the act complained of, though performed upon the occasion of a contract is independent of it, the plaintiff may then sue in tort.

In **Burnard v. Haggis, (1863)** the defendant, a minor was held liable in the following circumstances. He hired from the plaintiff a mare for riding on the express stipulation that she was not to be used for jumping. He nevertheless in breach of his agreement lent the mare to a friend, who while they were galloping about the field used her for jumping over a fence. In doing so, the mare fell upon the fence, and was so injured that she died.

Ballet Vs. Mingay (1943) is another case illustrating this aspect. In this case the defendant a minor borrowed an amplifier and microphone from the plaintiff. He lent them to a third party, who failed to return them. The Court of Appeal held that the minor who was liable in detinue to the plaintiff as he "failed

to prove that in parting with them he had not stepped outside the bailment altogether".

A tort cannot be covered into a contract. This rule is the reverse of the first rule that a contract cannot be converted into a tort to enable a person to sue an infant. If however the minor obtains properties through fraud and the property is still in his possession he is liable to restore that property to the other party. This is based on the sound principle that an infant will not be allowed to take advantage of his own fraud.

Liability of parent for minor's tort: A parent is not, as such liable for the torts of his child. However, there are two exceptions to this general rule. They are: 1. If the circumstances are such as to bring into existence the relationship of master and servant between parent and child, and a tort is committed by the child in the course of his employment. 2. If the child's tort was due to parent's own personal negligence in allowing his child an opportunity for committal of that tort.

Thus, where the child is acting as his father's chauffeur and drives car negligently, the father is, vicariously liable. So also, in a case where the father sends out his son on some business entrusting his bullockcart to be driven by him and the son causes injury to another by his negligence in driving it, the father is vicariously liable. In these illustrations the father, made answerable, not as being his father, but as being his employer.

Bebee. Vs. Sales (1916), illustrates the exception above mentioned. The father bought an air-gun for his son aged 15 years. Even after complaints of mischief caused by the use of the gun by the boy, the father allowed the gun to remain with the boy, who accidentally injured the eye of another with the gun. The father was held liable. However, in **Donaldson Vs. Mcniven (1952)** where a boy aged 13 had promised his father never to use his air-rifle outside the house (where there was a cellar in which the rifle could be fired) and subsequently, broke that promise by firing it in the street and caused injury to the eye of the plaintiff. The Court of Appeal held that the negligence in that case was merely the negligence of the boy and that the father had not been negligent in any way.

Lunatics or persons of unsound mind and Drunkards: There is very little authority of persons of unsound mind for torts committed by them. Lunacy is no defence to an action in tort, but in cases where liability depends on some specific state of mind, lunacy may be strong evidence to show that the necessary element is lacking and may therefore, be a good defence. In this context, it may be noted that the object of criminal law being, punishment, mensrea or guilty knowledge is an indispensable condition for fixing penal liability but the object of the law of torts being reparation or payment of compensation it is quite proper that the lunatic be held civilly responsible and gives satisfaction for damage done to the injured person.

In **Morris vs. Morsden (1952)** the defendant lunatic was held liable for causing bodily injury to the plaintiff. The case is therefore an authority for the proposition that if a lunatic has that state of mind required for liability in the particular tort with which he is charged, then his insanity is no defence. All that is required in battery is that the defendant must intend to strike the blow at the plaintiff.

In **Newzeland Donaghy vs. Breuman (1901)** a lunatic was held liable for injuring the plaintiff by firing a gun at him. In **Ranganagulu vs. Mullackal Devaswam (1947)** in Kerala a lunatic was held lable for damage, for having entered the temple with shoes and for having broken the idol of the deity.

Grounds of Liability: (1) As between two innocent persons it is reasonable that the loss falls on him who caused (2) To induce the relatives of the lunatics to be little more careful of them (3) He must bear the loss occasioned by his torts as he bears his other misfortune.

Drunkenness: This is no excuse for the commission of an offence and hardly therefore it will excuse a tort. But as in the case of criminal law, if the intoxicant is administered against his will, or by mistake or fraud then the offence is excusable. The role of drunkenness I should point out to you, applies also to acts of an epileptic person.

Married Women : Under the English, law, until 1935, a married women suffered several disabilities placed upon her. She could neither sue nor be sued unless her husband was joined with her as plaintiff or defendant since it was

considered that for procedural purpose; she had no existence apart from her husband. Since the husband was a necessary party to proceedings for torts committed by his wife, he was liable to pay damages for such torts.

The disability placed on a married woman in the above regard and the hard fate to which the husband was subjected to viz. to pay for his wife's wrong doings, was relieved by the **Law Reform (Married Women and Tortfeasors) Act, 1935.** Under this Act, the married women may sue or be sued in all respects. By section 3 of the Act, it is provided that a husband shall not, by reason only of his being her husband be liable in respect of any tort committed by his wife whether before or after the marriage.

Moreover, formerly a husband could not sue his wife in tort at all and actions in tort by a wife against her husband was permitted only "for the protection and security of her own property". Now however by the **Law Reform (Husband and Wife) Act 1932,** each of the parties to a marriage has the right of action in tort against the other, as if they were not married.

Indian Law: In India there was also the Married **Women's Property Act of 1874.** Under this Act, a married woman to whom the Act applies may sue or be sued in tort as a feme sole. Hindus, Buddhists, Sikhs, Jains and Mohammedans are covered by the provisions of the Act and they are governed by their personal law in such matters, Christians and Anglo Indian who follow English Common Law, will be covered by the provisions of the above Act of 1874.

Under the Indian law, the husband is not liable for the torts committed by his wife.

2.12. CORPORATIONS AND UNINCORPORATED BODIES

Corporations : A corporation is an artificial legal person, distinct from its members. Generally corporations are divided into two categories viz., Corporation aggregate and Corporation sole. A 'Corporation aggregate' is a group of persons contemporaneously associated. So the in the eye of law, they form a single person e.g. a Municipal Corporation or if a Company which may be incorporated by registration under the Company's Act for carrying on some

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A corporation can sue for any tort in the same way as any individual except that some torts such as assault false imprisonment cannot be by their very nature, be committed against a corporation. A corporation can sue for the malicious prosecution of a winding up petition and for defamation provided the defamatory matter affects its business or property.

At one time it was thought that a corporation being fictitious person, having no body or mind, could not be sued for torts like malicious prosecution or deceit where a wrongful intention is a necessary element. It was now well settled that even though the corporation may not have the requisite mental elements for such a tort, its agents or servants are capable of having the same and therefore if the act is done within the course of their employment the corporation is liable for their act like an ordinary employer. A corporation could therefore be held liable not only for trespass, libel, conversation or negligence but also for malicious prosecution and fraudulent misrepresentation.

Torts ultra vires and intra vires: Many corporation are expressly limited by the terms of their incorporation (Memorandum and Articles of Association) as to the acts which they may lawfully do. If they conform to the restriction imposed upon them, they are said to be acting intra vires and this is till the case even when they commit a tort, provided it is then as an incident of some act which falls within their powers. If the corporation goes beyond the limits of powers conferred on them the tort is said to be ultra vires.

Intra-vires Torts: As stated earlier, Corporation have no mind and body and must necessarily act through its agents and servants. All the acts, and therefore, all the wrongful acts of a Corporation are in fact, the acts of its agents or servants though imputed in law to the corporation.

But this does not mean that liability of a corporation, is therefore in all cases a vicarious liability for the acts of other person. A corporation may have to

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discharge certain primary obligations, and if there is breach of such a primary obligation, resulting in a tort, the corporation is personally liable.

If the tort is committed by a servant or other agent of the corporation acting in the course of his employment then the corporation is liable on exactly the same principle that any employer is vicariously responsible in like circumstances.

Ultra Vires torts: It may happen that the tort for which the corporation is sued is committed in the course of an activity which is beyond the power of the corporation. It is in such cases, the doctrine of ultra vires is attracted. There are three classes to be considered in this connection.

They are : 1. Where the corporation engages in an undertaking which though otherwise lawful, is not within the statutory or legal limits of the corporation's powers. In such a case the corporation cannot *validly* employ persons to carry out the ultra vires undertaking. So in the absence of a valid contract of employment the relationship of master and servant will not exist between the corporation and the actual wrong-doer, with the result that the corporation will not be vicariously liable for his tort.

2. Where a servant of the corporation employed under a valid contract of service, commits a tort and the activity on which the servant was engaged at the time is ultra vires the corporation, can it be said that the servant was acting within the scope of his employment so as to make the corporation liable? The case of **Poulton.Vs.L. and S.W.Rly (1867),** is considered to be the leading authority on this question. In this case railway company had the power to arrest a person for non payment of passenger fare. But the station master wrongfully arrested the plaintiff, because he refused to pay the fare of his horse. The power to arrest in such circumstances was quite outside the defendant's power. It was held that they were not liable, for the station master did not have implied authority to arrest persons for failure to pay for carriage of the animal and as such, the defendant - railway could not be vicariously liable for the same.

Check Your Progress

7. What is meant by Ultra vires torts?

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3. The tort may have been expressly authorized by the corporation by the "directing mind and will die of the corporation". In this class of cases according to Clerk and Lindsell, the corporation is liable, not on any principle of vicarious liability, but for its own tort and so, the applicability of the doctrine of ultra vires does not present a problem. In **Campbell Vs. Paddington Corporation (1911)** the defendant corporation by a formal resolution of its council erected a stand was ultra vires of corporation. It was held that the corporation was liable, because it was a public nuisance.

In India in the case reported in **Theruveriamuthu Pillai Vs. Municipal Council, Shencotta,** the plaintiff's dog was killed by the employee of a municipal council in the course of the discharge of his duty in killing stray dogs in the municipal town expressly authorized by the council. In an action by the plaintiff for damages against the council for the loss of the dog held that the council was liable and the fact that the council acted in excess of its statutory powers was no defence.

UNINCORPORATED BODIES

An unincorporated body has no legal personalty and cannot sue or be sued as such. The only course open to the person aggrieved by a tort committed by any of the officers or members of the body is to sue the wrong doer personally. The principle, which is of general application was departed from in the case of trade union by the decision of House of Lords in **Taff Vale Rly v. Amalgamated** (Society of Railway Servants, (1901) where it was held that the registered trade union, though not a corporate body could be sued in its registered name. the decision occasioned great controversy and agitation and was nullified by the **Trade Disputes Act, 1906.**

In India the Trade Union Act, 1926, provided that the registered trade union shall be a body corporate by name under which it is registered and shall sue and be sued by that name.

In **Pole. v.Allea, (1950)**, an unincorporated committee of a club was held not liable for negligence of the club steward resulting in physical injury to a member who fell down the steps of an unlighted staircase. The steward was held liable as he could be regarded as the agent of each members.

2.13. FOREIGN SOVEREIGNS AND AMBASSADORS

In English or Indian Courts, an action will not lie against a foreign sovereign for any tort committed by him, for he is exempted from the jurisdiction of these courts, unless he submits to their jurisdiction; the basis for the immunity is put on different grounds such as that the exercise of such jurisdiction would be inconsistent with his legal dignity, that reciprocal rights of immunity are to be secured thereby, and that possible classes due to feelings of injured would thereby, be avoided. Whatever be the true explanation this immunity is available not only to foreign sovereigns and states but also to departments of foreign states, whether or not they have independent legal existence. **In Kranjia Vs. Tass Agencies (1949)** the plaintiff brought an action for an alleged libel contained in the Soviet Monitor, which had been published in England by the defendant it claimed immunity from jurisdiction on the ground that the Tass Agency is a department of the Soviet State. The Court of Appeal found it to be so and held that it could not be sued in England.

The only remedy for injuries done by a foreign sovereign is by way of diplomatic action at Governmental level. A foreign sovereign does not by residing in British territory or Indian territory, waive his privilege or submit himself to the jurisdiction of local courts, nor does it make any difference that the wrongful act is done by a sovereign in his private capacity.

The exemption does not import immunity from legal liability but only, exempt from local jurisdiction. So it may be waived by the sovereign and he may submit to jurisdiction of local courts. In **Sultan of Johur vs. Abubaker Tunku Aris Bendhas (1952)** it was held that immunity had been waived, the proceeding in the British Jurisdiction being merely a continuation by way of appeal of proceedings instituted by the foreigner in a court under the Japanese occupation.

Ambassadors : An ambassador or diplomatic agent and his family and staff enjoy immunity from against them as provided under the Diplomatic Privileges Act, 1964, the old law before 1964 gave wider immunity once a person had been accepted as a diplomatic representative of a country, he was totally immune from the criminal and civil jurisdiction of the local courts during the

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terms of office. But by the Act of 1964 the immunity has been curtailed to some extent.

Under Section 86 of Civil Procedure Code 1908, in India an ambassador or an envoy of a High Commissioner of Commonwealth country and member of their staff cannot be sued in any court except with the consent of the Central Government.

Insolvent: An insolvent may be sued for torts of all kinds whether committed before or during insolvency. Insolvency does not operate to discharge him from liability for a tort. It is to be noted that demands for unliquidated damages founded on torts are not debts against the insolvent's estate.

As to the right of action for tort, the law is this; a distinction is to be drawn between torts to the person and torts to property of the insolvent. A right of action in respect of tort resulting injury exclusively to the insolvent's property passed to the Official Assignee or Official Receiver (who represents his estate) or the benefit of his creditors. But right of action in respect of a tort affecting exclusively the reputation or feelings of the insolvent, such as, an assault or defamation or seduction of a servant remains with the insolvent and he can sue.

Where a tort causes injury both to the person and property of the insolvent, the right of action will be split; the claim for the personal injury will remain with the insolvent while that for injury to his property will pass on the Official Assignee or Receiver.

CONVICT: In England, criminals even when undergoing imprisonment have the same right of action for torts as a man with a blameless. This is the effect of the **Criminal Justice Act, 1948.** It would seem that convict in India now may himself sue for torts, both to his person and property.

2.14. SUMMARY

In Ryland Vs. Fletcher, the person who brought something in his land, which escapes and causes mischief to other person's land, the former person who brought the mischief thing was held to be liable. The General defences available

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under the law of torts have been elaborately discussed and several related case laws were explained in detail.

Soverign and Foreign sovereigns, Ambassadors, Corporations, Unincorporated Associations, Trade unions, Infants, Lunatics, Married women, cannot be sued or sue others except in some exceptional circumstances. In England Convicts, Alien Enemies, Insolvents can not sue. In India foreign envoys or member of their staff cannot be sued without the prior permission of the central Government.

2.15 ANSWER TO CHECK YOUR PROGRESS

1. Refer 2.2
2. Refer 2.3
3. Refer 2.4
4. Refer 2.5
5. Refer 2.9
6. Refer 2.11
7. Refer 2.12

2.16. KEYWORDS

Ambassador	-	A diplomat sent by a state as its permanent representative in a foreign country.
Vis major	-	Act of God
High Commissioner	-	A diplomatic person of the commonwealth countries
Magistrate	-	an official with authority to judge.
Judge	-	a Public Officer who deides cases in a law court.
Sovereign	-	possessing supreme power.

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2.17. MODEL QUESTIONS

1. Examine the capacity to sue or being sued of the following Cases :

   a) Minors b) Married women c) Corporations

2. Explain the inevitable accident as a defence and distinguish it from 'act of god'.

3. Examine 'volunti non fit injuria' as a condition negativing liability.

UNIT – 3

THEORIES OF TORTIOUS LIABILITY

INTRODUCTION

In this unit we are going to discuss the basic principles of vicarious liability and Joint tortfeasors with related case laws. Further, we will examine the liability of a person, for the tort committed by another. Such liability of the person for the misconduct of another, although he himself is of no fault is stated as "vicoarious liability". Now left us proceed to discuss these aspects of tortious liability.

UNIT OBJECTIVES

- To study the essential conditions of liability in torts.
- To understand the meaning and scope of vicarious liability.
- To analyse the joint and Independent tortfeasors.
- To study the remotness of damage theories.

UNIT STRUCTURE

3.1. Vicarious liability

3.2. Casual Delegation

3.3. Course of employment theory

3.4. Liability of master for frauds of servent

3.5. Liability of hospital Authorities

3.6. Doctrine of common employment

3.7. Liability of the Independent contractor

3.8. Joint tortfeasors

3.9. Independent tortfeasors

3.10. Remoteness of damage

3.11. Novus actus interveniens

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3.12. Foreign Torts

3.13. Effect of death of parties in torts

3.14. Statutory exceptions

3.15. Summary

3.16. Answer to Check your progress

3.17. Key words

3.18. Model questions

3.1. VICARIOUS LIABILITY

Basis of the rule of vicarious liability:- Jurists have suggested various reasons for the rule of vicarious liability 1) *Qui facit per alium facit* per se thereby meaning that he who acts through another is deemed to act in person: *Respondent Superior*, 'Let the Principal answer': 2) Let the master who is capable of paying pay, for the servants who are financially weak 3) Again it has been said that it is the master who set the whole thing in motion. In fact the true basis of the modern rule of vicarious liability is based on public policy.

There are two conditions to be proved to render the master liable for the tort committed by his servant (1) The relationship of master and servant subsisted between the defendant and the actual wrongdoer: (2) The tort was committed by the servant while he was engaged in the course of employment of the master.

Where the relationship of master and servant does not exist, but one person engages another to accomplish a specified result, the relationship is that of principle and independent contractor. In such a case, the work although done at the employer's request for his benefit, is considered an independent function of the person, who undertakes it and it will not ordinarily make the employer liable for injury done in the performance of the task.

Who is a servant? Difference between a servant and an independent contractor?:- Both the servant and the independent contractor work for another but a servant is under the continuous, dominant and detail control of the master

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over every step in the activities of the servant in relation to the business for which he is employed by the master. Thus the master has not only the right of control over his servant but also the right to direct the servant in the very mode or manner of doing the act. But an independent contractor is his own master having full discretionary power over his activities. He undertakes to produce a given result but is not under the control of the employer, (2) servant is an event who works under the strict supervision control and direction of his employer. He is employed to obey his employer's order from time to time. An independent contractor is engaged to do certain work in his own discretion, he is bound by the contract not by the orders of his employer.

Quarman v. Bumerr:- Here the defendant the owner of carriage, who usually hired a horse from another person along with the river was held not liable for damage caused to the plaintiff's carriage by the horse. **Jones vs. Scullard:** Here the defendants who owned the horse also along with the carriage were held liable. Thus it is difficult in some times to determine whether an employee is a servant or an independent contractor.

Mersey Docks Harbour Board vs. Coggins and Griffiths Liverpool Ltd., (1947). The Board owned many mobile cranes, each handled by a skilled workman engaged and paid by it, in the ordinary course of his business it hired out a crane to the respondents a stevedoring company for use in loading a ship. The power to dismiss the driver remained with the Board, but the contract provided that the driver was to be servant of the hirers. While loading the cargo, the driver was under the immediate control of the hirers in the sense that the hires could tell him which boxes were to be moved ad where to .place them, but they could not tell him how to manipulate the controls of the crane. Through the negligent handling of the crane by the driver while loading, a third party was injured. The House of Lords held that the Board was solely liable. There is very strong presumption indeed that a man remains the servant of the general or permanent employer although another employer borrows his services. Thus, where cranes or vehicles are let out on hire with the driver, owner is responsible for his servants, negligence unless he was divested himself of all possession and control.

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The House of Lords in **Mersey Dock Harbour Board Case** has approved the decision in **Donovan v.. Laying Construction Syndicate.** The defendant, in this case, contracted to supply wharfingers with a crane and a man to work it. He received his instruction from the harfinger and they alone were held liable for an accident by his negligent working of the crane.

· **Annamalai Timber Trust Ltd., vs. Trippunithura devasam.** The timber trust has taken an elephant with two mahouts from the Devasam on lease for a year. The mahouts were under the control of the defendant during the lease period. The mahouts ill treated the elephant on it refusal to drag very heavy logs. The elephants died in consequence of gross negligence of the two mahouts. In a suit filed against the Timber Trust the Travancore High Court held that the mahouts were servants of the hirers and as such the defendants were held liable.

This case established that no universal and conclusive test can be laid down, "Who is the pay master, who can dismiss how long his alternative service lasts, what machinery is employed have all to be kept in mind". The determinative factor is : Which of the two employers, general or the special, has the right to control the servants method of working. Various other High Court in India have taken a view consistent with the rule laid down in Mersey Docks case. Mersey Dock Harbour Board case correctly laid down the law.

Liability for causal delegation to relations or friends - **Samson Vs.Atchinson:** In this case the owner and driver of a car allowed the son of a prospective purchaser to drive but he continued to sit near the son's side. Plaintiff was held entitled to recover damages for injuries caused by the son, from the owner of the car.

In **Pratt Vs. Patrick (1927),** the defendant took two friends. A and B for a drive A drove the car and owing to his negligence it collided with another vehicle causing injuries to B, as a result of which he died. B's widow sued the defendant for recovery of damages resulting from her husband's death. Held that as the defendant was in the car and as there was no evidence that he had abandoned his right of control, he was liable notwithstanding the entrustment of physical management and mechanical control of the vehicle to A at the time of accident.

Check Your Progress

1. What is vicarious liability?

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Parker Vs. Miller: Here the owner was not present in the car. The car was in the charge of his friend who negligently left it outside his house. Still the owner was held liable on the ground of control not mere physical control.

Smith Vs. Moss: The plaintiff here in was injured when the car driven by her husband collided with another, the owner of the car being the husband's mother. The husband was driving the car as the owner's servant, Held: wife could sue the husband. In **Broom Vs. Morgan,** the Court of appeal held the employer of a married man liable to his wife for the husbands negligence in the course or employment.

From these cases it is clear whether there is causal delegation or not is a question of fact to be decided according to the circumstances involved in each case. Another point that you must note here is that a superior servant is not considered to be the master of his subordinates for the purpose of vicarious liability. Same is the case with regard to Directors and Heads of Departments of Governments.

In **Ormrod v. Crossville Motor Services Ltd. (1953)** the owner of a car from Birkenhead to Monte Carlo, were to start for a holiday together. Shortly after leaving Birkenhead, by the negligent driving of the friend an accident happened. Held that the owner of the car was liable.

3.2. CASUAL DELEGATION

In the case of casual delegation if there is breach of duty, the owner is not liable to compensate the loss. In **Sitaram Motilal Kabal Vs. Santhanuprassad (AIR 1966 S.C. 1697)** owner entrusting his car, to M for plying it as Taxi. M training cleaner of Taxi to drive for driving test. Accident occurred while giving test by C's Negligence. The injured claimed damages from the owner. As per majority Judges, the presumption that a vehicle is driven, on the master's business was negative because the vehicle was proved to be driven by an unauthorized person and on his own business. The defect was not the driver, or the agent of the owner, but one who had obtained the car, for his own business not even from the master, but from a servant of the master. The owner would not be liable in such circumstances.

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3.3. COURSE OF EMPLOYMENT THEORY

Where the relationship of master and servant is established, the master is liable for the torts of the servant only when they are committed in the course of the servant's employment. Under this the master is liable if it is either (1) a wrongful act authorized by the master or (2) a wrongful and unauthorized modes of doing some acts authorised by the master. It is clear that the master is liable even for acts which he was not authorised, provided they are so connected with acts which he was authorised, they may be regarded as modes, although improper modes of doing them. In other words, a master is responsible not merely for what he authorized his servants to do but also for the way in which he does it. If a servant does negligently that which he was authorized to do carefully, or if he does fraudulently that which he was authorized to do honestly, or if he does mistakenly that which he authorized to do correctly, his master will answer for that negligence, fraud or mistake.

Limpus Vs. London General Omnibus Co: The defendant company was held liable for an accident caused by its driver racing with another bus and driving it so rashly as to overtake the other bus. It was held to be no defense that the company that issued instructions to its driver not to race with or obstruct other vehicles. The employer was held liable, for driver intended to benefit him by his willful or deliberate act. But in **Lloyd V. Grace Smith and company** the defendant company was held liable for the employee's fraudulent and dishonest acts though not intended for the company's benefit.

Canadian Pacific Railway, Vs. Lockhart (1942). The employers were held liable when their servant in disobedience of order not to use uninsured motor cars, drove his own uninsured car while on a journey for the work he was employed to do. The principle of law laid down in this case followed by the Court of Appeal in Cattermole's.

As regards vicarious liability, the existence of master and servant relationship is considered essential. The phrase implied authority which has been the corner stone, of employment. In the case of **M.S. Grewal Vs. Deepchand Sood 2001 (5) SCC** on facts, the school children nearly 15 members along with two teachers went for a picnic. During picnic the school children drowned in

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water and died. It was the act of the utter negligence of the two teachers which resulted in unfortunate tragedy and the school as master liable to pay compensation.

To work out compensation, the multiplier method, which is adopted in Motor Vehicles Act also can be followed.

Century Insurance Co. Vs. Northern Ireland road transport board (1942) : The driver of a petrol lorry employed by the defendants, while transferring petrol from the lorry to an under ground tank in the plaintiffs grage, struck a match and threw the burning match on the floor and thereby caused fire resulting in damage to the plaintiff's property. Although the act of lighting of cigarette was itself unconnected with the driver's employment, considered in connection with the delivery of petrol it can be seen to amount to a negligent method of doing his work. His employers were, therefore held liable for damage caused.

Beard Vs. London General Omnibus Co., (1900) At the end of a journey, the driver of the defendant company went to take his dinner. During his temporary absence, the conductor tried to reverse the bus for the journey and by his negligence caused an accident injuring the plaintiff. The defendant company was held not liable, as the conductor was not a person authorized to drive.

This case was not followed by the King's Bench in **Rickets Vs. Thos Tilling (1915)** where the driver sat by the side of conductor who drove the bus and injured the plaintiff. This was considered to be unlawful delegation of duty for which the driver would be liable and consequently for this breach of duty the employer would also be liable vicariously.

Exactly on the same facts of **Rickets'** case, the Madras High Court followed the view taken in that case in its decision, the **Rasipuram Union Motor service Vs. Ramaswami Goundan** and held the master liable on the ground that the driver's act of permitting the conductor to drive negligently along the road was a breach of duty for which the driver is liable and master vicariously liable.

Biharilal Vs. Surrender Singh (1965) A driver of a lorry handed over the steering wheel of the vehicle to the cleaner, and sitting by his side, allowed

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him to drive the lorry. As a result of the rash and negligent driving by the cleaner, damage was caused. Held, that the owner of the lorry was liable to pay damages.

Ganga Sugar Corporation Vs. Sukdev Singh : In this case the jeep driver left ignition Key in the jeep and in his absence a third party drove the jeep and caused an accident and the negligent driver and his master were held liable. Since the driver was in the course of employment and he could have reasonably anticipated interference by a stranger, the master was held liable.

Nalini Rajan Sen Gupta Vs. Corporation Of Calcutta (1925) : The chauffeur was taking his master's car to a workshop for repairs. As the found the road leading to the workshop blocked, he left the car in charge of the cleaner, whose duty was only to clean the car. During the driver's absence, the cleaner drove it and dashed against a municipal lamp post and broke it. In an action against the master, it was held that he was not liable for the cleansers act which was beyond the scope of his employment and further, the chauffeur was not negligent in leaving it with the cleaner, in the circumstances.

3.4. LIABILITY OF MASTER FOR FRAUDS OF SERVANT

FRAUD : If the servant does fraudulently that which he is employed to do honestly, the defendant bank was held liable for fraudulent representation made to the manager of one of bank's branches, in relation to the business under his control. It was generally thought that this case laid down that the wrong must be intended to benefit his master.

However, the House of Lords in **Lloyd V.Grace, Smiths Co** (1912) laid down that Barwick's case was no authority for this proposition. The facts in this case are. The managing clerk of a solicitor firm, defendant in the action, induced a client, who went over to their firm to get documents drafts for sale of property of his own benefit. The House of Lords held that the defendant firm was liable for the clerk's fraud.

THEFT: It was formerly thought that a master is not liable for theft committed by his servant on the ground that the act of stealing must necessarily be an act outside the course of his employment. This view was expressed in

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Cheshire Vs. Bailey (1905). This has been, however overruled in **Morris Vs. W.G. Marlin & Son Ltd. (1916).**

In this case, the plaintiffs fur coat had been delivered, with her permission to the defendants, to be cleaned. The defendant's servant of whom they had handed it for necessary work to be done stole it. The defendants were held liable for the theft by the servant, since the conversion by their servant, amounted to the dishonest performance of that which had been employed to do honestly.

In **Ruplal Vs. Union of India.** It was held that the defendant Union of India was liable for theft theft committed by certain jawans, who while on duty lifted firewood belonging to plaintiff in their army vehicles for making camp fires.

MISTAKE : In **Bayley Vs. Manchester, Railway, (1973)** the defendant's partner voluntarily pulled out a passenger from a train which was about to start, mistakenly thinking that the passenger was in the wrong train. The defendants were held liable, since passenger was doing, in a stupid way what he had been authorized to do, namely, to see that passengers were in the right train.

Poland Vs. John Parr & Sons (1927) A carter in the defendant's employment was following close behind a wagon transporting bags of sugar. He saw a boy walking beside the wagon with his hand on one of the bags. He immediately thought that the boy was pilfering sugar and so struck the boy on the back of his neck with his hand. The boy fell down and a wheel of the wagon ran over his foot. The employer was held liable because the blow given by the carter, although somewhat excessive, could not take the act of the servant outside the scope of his employment.

3.5. LIABLITY OF HOSPITAL AUTHORITIES

The law on the point has not yet settled. In **Hilleyer Vs. Bartholomew's Hospital (1909).** The Plaintiff who was taken to the operation theatre, but when brought out of the theatre, it was found that one of his hand was burnt and the other was bruised. Some of the nurses who were assisting the surgeon, negligently kept his hand on an electric heater and over the other rested on the

Check Your Progress

2. What is the liability of Master for frauds of servant??

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table a heavy weight was kept. The plaintiff sued the authorities for negligence of the nurses. It was held that as soon as the door of the operation theatre was closed the surgeon reigns supreme and the nurses cease to be the servants of the hospital authorities as they act under the orders of the doctors. This seems no longer good law. In modern cases professional persons like radiographers, house surgeons, anaestheists, have been held to be servants of the hospital organization for the purpose of vicarious liability and not employed by the patient himself.

Etti Vs. Secretary Of State (1939): A child entrusted for treatment in the Govt. hospital Egmore was lost while in their custody and could not be returned to parents. A suits for compensation for Rs.3000 for negligence of the servants of hospital was dismissed by the High Court.

In **Gold Vs. Essex (1942),** the Court of Appeal that held the hospital authority was liable for the negligence of a radiograph employed under a full time contract of service.

In **Cassidy Vs. Ministry of Healthy (1951)** the plaintiff's hand was rendered useless by the negligent post-operational treatment afforded by the medical officer, surgeon and nurses of the hospital authority each of whom was employed under a contract of service. The fact that these employees were exercising professional care and skill was held to be no defence.

Hall Vs. Lees (1904) defendants suppliers of trained nurses to attend to patients at their residence were held not liable for injuries sustained by a nurse by her own negligence. At the time of the accident she was under the control of the patient and there was no master and servant relation subsisting between the defendant and the nurse.

In the Hospital negligence, according to **Hilleyer Vs. St. Bartholomew's Hospital,** for the Doctor's negligent Act, Hospital authorities as master not liable to compensate the loss. But this principle has been modified and even in the case of Doctors as employees in the Hospital, by negligence causes injuries to third parties, Hospital authorities as master liable to compensate the loss. The defence of control, i.e., how to do the job is absent and hence master not liable, is not available to the master who own Hospitals. In the case of **Aparna Dutta Vs.**

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Appollo Hospital (AIR 2000 Mad. 340), the fact was that Arpana Dutta, was a lady and she belonged to Guwhati, and she got married with an American and settled in Dubai. She felt stomach ache and found out tomour, in the stomache, she wanted to operate over the same. She wanted to admit in a world class Hospital and choose to under go operation in Appollo Hospital, Chennai. She underwent operation and after operation, she again felt pain in the abdomen. When she complained of pain, the Hospital authorities simply said it is Post-operative pain. But she felt enormous pain, untolerable, she wanted to have check up and admitted in Royal Medical Centre, Dubai. There the Doctors found foreign object ie., Bandage ball cloth that have been put inside and stitched. She filed a suit for compensation for pain and suffering and negligent operation of Doctor for Rs.25 lakhs, but the Appollo Hospital as master contended, that Doctors are not under their control, and hence masters are not liable. But Madras High Court modified the principle in **Hilleyer Vs. St. Bantholomew's Hospital** and held, even for Doctor's negligence the Hospital authorities as master liable to compensate the loss.

Further in the Consumer Protection Act, if services is rendered free, Government as Master not liable to compensate the loss. But the latest trend and to protect the welfare of the citizens, even Government as Master liable to compensate the loss, if any injury has been caused by Doctor's negligence. In the case of **Achutraw Haribhaw khodwa and other Vs. State of Maharahtra (AIR 1996 SC 2377)** on facts, when the patient under went operation in the Government Hospital, mop left in the body of the patient and there was perforation and the patient died. Here the State was held liable for damages.

In the case of State of **Haryana Vs. Santra (2000 (1) CPJ 53 S.C.)** on facts, Government announced, sterilization scheme to control population, the lady Santra underwent operation and also got certificate. The Haryana Government also announced solatium to those who underwent operation in the sterilization scheme announced by the Government. After some time she conceived and complained to the Doctors; but the Doctors said she was not pregnant. But she was pregnant and gave birth to a child. Santra filed a claim of compensation for having a child, due to negligent operation of the doctors. Supreme court awarded

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compensation of Rs.50,000/- to bring up the child till majority on the basis that Government as master liable to compensate the loss.

The above proposition of law also got support in England. In the case of **Eonet Cl. Kensington and Chelsea Vs. Westminister Area Health Authority 1984(3) All (E.R) 1044** the Defendant's negligent performance of sterilization operation resulted in the birth of the child. It was held that there was no rule of public policy which precluded recovery of damages for pain and suffering for maintaining three children.

3.6. DOCTRINE OF COMMON EMPLYOMENT

The doctrine means that the master is not liable to a servant who is injured by the wrongful act of a fellow-servant who is at the time in common employment with him. In other words this defence was raised whenever a master was sought to be held liable under the rule of vicarious liability.

It was first propounded by **Lord Abinger in Priestly Vs. Flower (1873).** In the case, the plaintiff alleged that he was required by the defendant, his employer, to go in a van driven by another servant and the van being in an unsafe condition and overloaded, broke down and that the plaintiffs thigh was fractured. The action was dismissed on the ground that a servant must be deemed by accepting the service to have consented to take its risk and also that these risks included faults of the fellow servants. This doctrine was confirmed in later cases in England.

In course of time the doctrine of common employment became unpopular as it was considered to favour employers at the expense of workmen. Its scope was gradually limited and ultimately abolished by the **Law Reform (Personal Injury) Act, 1948,** according to which any contract between the master and servant incorporating this defence was rendered void. The National Insurance (Industrial Injuries) Act 1946 prohibited the defence of contributory negligence against servants. So the defence of common employment has been completely taken away now.

Check Your Progress

3. Explain doctrine of Common Employment?

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In India also, the same is the law consequent to the amendment of the Employer's Liability Act, 1938, by the Amendment Act of 1951. The doctrine of common employment has been abolished in India. So the decision of Privy Council rendered in *The Governor General, in Council v. Constance Zena Wes* (1950) prior to the amendment of the Employer's Liability Act no longer holds good.

3.7. LIABILITY OF THE INDEPENDENT CONTRACTOR

Although an employer is not generally liable for the torts committed by an independent contractor, there are certain exceptions to this rule. These cases of liability of the employer for the torts of his independent contractor are as follows:-

(1) Where the contractor is employed to do an illegal act both the employer and the independent contractor will be liable (as joint tort-feasor).

(2) Where the contractor is negligently employed (or selected for discharged of duties which he is bound to do properly) the employer will be guilty of negligence and liable as such. As for example, if a statute required a person to do a particular act and the independent contractor employed by him fails to do that act he cannot escape liability by pleading that the fault was not his but that of the independent contractor.

In **Gray Vs. Pullen (1864),** the defendants were empowered by statute to make a drain across a highway and were required by the same statute to reinstate the road properly after the drains were made. The defendants employed a contractor to do the work and he neglected to reinstate the road properly whereby damage was caused. The defendants were held liable.

In **Bower Vs. Peate (1876)**, it was held that where one of the two adjoining houses is entitled to support from the other or from the soil underlying it, the owner of one of the houses proposing to rebuild his house or to excavate the foundation for the purpose, cannot escape liability for the consequences of withdrawing the support to which the adjoining house is entitled, by entrusting the task of excavation and rebuilding to an independent contractor.

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(3) **Operations on the High Way:** The liability of the employer also arises for the damages caused on or near the highway. Thus in **Tarry Vs.Ashton. (1876)** the dependent employed an independent contractor to repair the lamp attached, to his house and over hanging the footway. As it was not properly attached, the lamp fell on the plaintiff, a passerby and the defendant was held liable because "it was the defendant's duty to make the lamp reasonably safe ... The contractor failed to do that... and therefore the defendant has not done his duty and he is liable to the plaintiff for the consequences".

(5) In extra hazardous acts employer will be liable to such dangerous acts e.g. Flash photographs. In **Black Vs. Christ Church Finance Co, (1894)** where the defendant who had spread to the adjoining land of the plaintiff and caused damage to his property, was held liable.

(6) Acts of Strict liability: Some acts should be done only after assuring safety to neighbours and default to provide such safety renders them liable under the strict liability rule (see Ryland V.Fletcher).

3.8. JOINT TORTFEASORS

Introduction: A tort may be committed by one or more persons. When it is committed by several persons such persons are either joint tortfeasors or independent tortfeasors. Persons are deemed to be joint tortfeasors within this rule whenever they are responsible for the same tort. This happens in three classes of cases viz, agency, vicarious liability and common action. It means where a tort is committed in the course of a common action, a joint act is done in pursuit of a common purpose.

Who are joint tortfeasors: Joint tortfeasors are those who are jointly liable for the same tort. In the case of *The Koursk* (1924 P 140) the Court of Appeal defined joint tortfeasors as follows: "persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design-There must be concerted action to a common end".

Therefore all persons who, in the eye of the law are responsible for the same tort are to be deemed joint wrongdoers, There must be some connection between the act of one alleged tortfeasor and that of the other, or as Sargent

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L.J.said, there must be a concurrence in the act or acts causing damage, not merely a coincidence of separate acts which, a by their conjoined effect, cause damage".

From this it is clear that in order to hold persons liable as joint tortfeasors there must be (1) common design and (2) concerted action among them. Therefore, parties are not joint tortfeasors unless they have mentally combined together to produce the common end. In other words, when several persons are engaged in a common pursuit and one of them in the course of and in furtherance of that commits a tort, all are liable as joint tortfeasors.

Illustration: Where two drivers X and Y with the object of getting in front of a car driven by Z, drive their respective cars in a rash and negligent manner that both the cars collide against Z's car and damage it, X and Y are liable to Z as joint tortfeasors. But, if damage is caused to Zs car without the concerted action between X and Y, they are only independent tortfeasors.

Where A and B jointly stole C's cow they are deemed to be joint torfeasors; but if they separately stone they are only independent tortfeasors. You must carefully note the distinction between joint and independent tortfeasors to understand their respective liability.

3.9. INDEPENDENT TORTFEASORS

When several persons, acting independently concur to produce single damage, they are called independent tortfeasors. As for example, where two motor cars comings in opposite direction rashly driven by A and B collide and crush in between them a pedestrian. A and B are independent tortfeasors. Here, though there is similarity of design, absence of concerted action makes them independent tortfeasors. Nevertheless, difficulty may arise to distinguish between the two when complicated facts are involved, e.g., the author, the publisher and the printer of a book containing a defamatory statement need not be joint tortfeasors.

Check Your Progress

4. Who is an independent Tortfeasors?

The following cases will make the position clear **Brook V Bool** (1928) 2 K.B. 578, Z and Y entered R's premise to examine leakage of gas from a Room

(Space for Hints) with a naked light. Here, though the act of Z caused the explosion; both Z and Y were liable as joint tortfeasors.

Thompson Vs. London County Council (1899). The palintiff's house was damaged by excavations carried on by A followed by the negligent act of B who left a water main insufficiently stopped. Held, that A and B were not joint tortfeasors for their acts were independent. Though the damage is same the cause of action led to the damage are two.

Thus, among joint tortfeasors there must be not only mental concurrence but also concurrence in the ultimate consequence. Whereas in the case of independent tortfeasors there is concurrence only in the ultimate result of the wrongful act independently done.

Dr. Glanvile Williams preferred using, "incurrent tortfeasors" Joint concurrent 'and' several concurrent tortfeasors. "Concurrent tortfeasors" are those whose torts run together to produce the same damage. They are either "Joint concurrent tortfeasors" or several concurrent tortfeasors. In the former there is not a concurrence in the chain of causation leading to the single damage but also mental concurrence and in the latter there is concurrence exclusively in the realm of causation only.

There are mainly three classes of cases in which liability of joint tortfeasors arise. **1. Agency:** If A is employed as agent by B to act on his behalf which happens to be a tort the law imputes the wrong to both of them and holds both the principal and the agent liable and they are jointly and individually responsible for the act of the agent.

2. Vicarious Liability : Where A) commits a tort while in the course of employment of B, law imposed vicarious liability on. B) Both the master and the servant are deemed to be joint tortfeasors. C) Joint or common action: Where a joint act is done (or tort committed) in pursuauce of a concerted purpose all those who jointly commit the act (or tort) are liable irrespective of the share each had in the act (or tort).

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Nature of liability of Joint tortfeasors: Joint tortfeasors are jointly and severally liable so that each is liable for the whole damage and the injured person can sue either one or more of them separately, or all of them jointly for the full amount. So also, a judgement obtained against all of them may be executed in full against anyone separately or all of them jointly. This is not the case with independent tortfeasors. At Common law there were mainly, two rules dealing with the liability of joint tortfeasors.

1. **The Rule in Brinsmead's Case** and 2. The Rule of no contribution as between the joint tortfeasors or the Rule in Merryweathere's Case.

1. *The Rule in Brinsmead's Case:* Brinsmead Vs. Harrison (1871 L.R. 7 C.P.547): In this case B sued H for recovery of price of a piano. The defence was that the wrong was the joint one of H and T and that B obtained judgement against T.B., contended that he could not realize the amount from T and as such he was entitled to bring the subsequent action against the other tortfeasor H. Blockburn, J, held that the prior judgement obtained by B against, T was a bar to the subsequent action against the other trot feasor, H. The decision was based on the principle that in the interest of the State there must be a finality for litigations (Interest Republicaeut sit finisltium).

At common law, a judgement obtained against anyone of the joint tortfeasors was deemed to have released the other tortfeasors. It was thought that there was only one cause of action merged with the judgement already obtained and therefore, the plaintiff was debarred from suing again. This principle was extended to cover also cases where the palitiff could not recover anything (e.g., due to insolvency) under the previous judgement. To avoid the hardship caused to such plaintiffs the rule in Brinsmead's Case was modified by the Law Reforms Married Women and Tortfeasors Act 1935, Section 6(1) (a) of this Act provided that previous action against one or some of the tortfeasors was not a bar to subsequent suit against the other. Though the section permitted subsequent action, it provided that the amount recoverable should not exceed the amount awarded in the previous action. Besides, the Plaintiff could not recover costing the subsequent action except when the court thinks reasonable. This is to discourage multiplicity of action on the same cause.

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Illustration: A,B,C, and D jointly commit a tort against the plaintiff who first . sues A and obtains a judgment against him for Rs.1000/-. In subsequent action which the plaintiff may bring against B,C and D in turn, the Act prevents the plaintiff from being awarded an amount more than Rs.1000/- being the amount of compensation awarded in the first action. Nor he be allowed cost for subsequent action unless the court finds it just and necessary.

2. The rule of no contribution between joint tortfeasors: At common law a joint tortfeasor who satisfied the claim of the plaintiff could not seek contribution from other tortfeasors. The reason is that out of a turpitude no cause of action will arise (Ex turpi causa non oritur actio.) The wrongdoer must himself bear the consequences of committing a tort. To enforce a claim of contribution or indemnity is to enforce an implied agreement to commit a tort and share the profit or loss as the case may be.

This principle of law was laid down in **Meryweather V.Nixon** (1873). T.R.1861. A and B jointly destroyed the machinery of C who brought an action against both and obtained a judgement for 840 £ but levied execution only against A and recovered the entire sum from him. Thereafter A brought the present action against B for £ 420 by way of contribution. The Court dismissed the claim and observed, where one of the joint tortfeasors satisfied the decree he cannot obtain contribution from his co-judgement debtors.

Exception to the Rule in Merryweather Vs. Nixon : The rule formulated in this case had two statutory exceptions. a) Under the Maritime Conventions Act of 1911, where loss of life or personal injury occurs on board a vessel owing to the fault of the two vessels, the owner of the vessel who paid damages more than the proportion in which his vessel was at fault can recover the excess from the owner of the other vessel. b) Under section 37(3) of the Companies Act, the Director was held liable for false statement in the prospectus and can recover contribution from other persons who would have been also liable for such false statement. But this provision now stands replaced by the Companies Act, 1948 this Act incorporated the provision permitting contribution among tortfeasors from the Law Reform Act of 1935. the law is the same under Sec.62 Indian Companies Act,1956.

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The correctness of the rule in Merryweather's case has been seriously doubted and in subsequent cases it was modified so as to cover only cases where the person seeking contribution is presumed to have known that he was doing an unlawful act. In other words it was limited to purposeful wrong doing.

Adamson Vs. Jarvis (1827) 4 Bub. 66:- In this case the plaintiff, an auctioneer sold goods under instructions from the defendant who falsely told him that he was the real owner. The real owner recovered from the plaintiff the full value of goods wrongfully sold by him. Thereupon the plaintiff brought the present suit to indemnify him. Held plaintiff could recover the full amount from the defendant. The House of Lords also in **Palmar V.W. & P. Steam Shipping Co.** (184 AC 318) observed that the rule in **Merryweather's** case was not founded on justice, equity or public policy to justify its extension to Scotland. This is because the tortfeasor's claim of contribution is based on the assumption of an implied agreement between the tortfeasors and it would be unjust either to share the proceeds of a wrongful gain or to demand contribution or indemnity from the other joint wrongdoer.

The Rule in **Merryweather V.Nixon** has been completely abolished by the Law Reform (Married Women and Torfeasors) Act, 1935. This Act permitted recovering contribution from the other tortfeasors having regard to his extent of responsibility for the commissions of the tort.

An interesting point to be noted is the usage of the words "liable" and "responsibility" in section 6(1) and section (2) respectively. The expression 'liable' was interpreted to mean that contribution can be claimed from the co-tortfeasors only if he is also 'liable' in respect of the plaintiff's damage.

Illustration: If A and B jointly commit a tort against C and the former has been made to pay the entire claim to C, A can claim contribution from B only if both A and B were answerable to C for the wrong in respect of which the claim arose. If for some reason B could not have been held liable to C. A cannot demand any contribution from B.

Drinkwater Vs. Kimber (1952) 2 Q. B.281. In this case, the wife who was injured as a result of the combined negligence of her husband and D,

(Space for Hints) recovered the full amount of compensation from D. Held: D could not recover contribution from the husband since he could not be made liable to his wife for personal injuries.

The Act also provided that a tortfeasor cannot recover contribution from a co-tortfeasor whom he is bound to indemnify; as for example where an innocent person is led to commit a tort, or where the claim of contribution is set up against his servant in employment for reason that the master is vicariously liable to the servant. Nevertheless the fact remains, that an innocent master A can claim complete contribution of Rs.1000/- from B, the driver in his employment as a result of whose negligent driving C was injured and A compelled to pay Rs. 1000/- (*See - Semtex Ltd. V. Gladstone (1964) W.L.945*).

The same principle is illustrated in *Ramford Ice Co. V.Lister* (1957) 2Q.B.180. in this case, A and B father and son were in the employment of C.A, was injured by the negligent driving of B. A brought an action against C and recovered 1600 and costs as damages which after payment by D, the insures of C sought to recover from B, on the basis of his negligence or breach of duty to talk care while in employment. The court of Appeal held that D was entitled to recover.

Held further : 1. B committed breach of implied term in his contract of service with C.2. Although Band C were joint tortfeasors as against A's claim, C was innocent coming within the exception of Adamson V. Jarvis.

On appeal by the driver (b) the above said decision was affirmed by the House of Lords in Lister V.Raftered Ice Co (1957 A.C.55).

***The Law Reform Act*, 1935 and Independent tortfeasors:** At common law successive actions were permissible against independent tortfeasors. This is not changed by the Act. But the restriction imposed by the Act of 1935 regarding the amount of compensation recoverable by successive actions and the cost there of are applicable to independent tortfeasors as well.

It is interesting to note that the common law rule, that, a release of one of the tortfeasors is a release against all, even now stands as not modified by any statute. This is based upon the principle that the cause of action being one and

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indivisible having been released against one, all persons otherwise liable are also consequently released (*Luck V. Mayeu* (1892) 2 Q.B.511).

Indian law: In India, there is no enactment similar to the Law reform act, 1935 the decisions of various High courts are not uniform. The Madras High Court in ***Mantrala Yegnanaryana v. Venkamamidji Jaganatha Rao*** **(A.1.R.1962)** accepted the Rule in Merryweather's case and held that a person could not claim contribution for money paid by him for satisfying a decree passed against him and the defendant.

But the Allahabad High Court in *Dharn Dhar V. Chandra Shekhar* (1952) All. 752 (F.B.) rejected the rule of no contribution laid in **Merryweather *V.Nixon*** as inapplicable to India. Similarly, the Nagpur Hight Court in **Kushal Rao V.Babu Rao Ganapat Rao** (A.I.R.1942 Nag.52) held that the rule in Merryweather's case in its unmitigated form is inconsistent with justice equity and good conscience and should not be applied to Indian conditions. In this case five persons in partnership were granted a licence to cut timber in a forest and one of them was held liable to the whole of the damages though not more blameworthy. Suit was filed by him for contribution from others. Held court can distribute the loss among all the partners in accordance with their interest in the partnership. Because the plaintiff was to be blamed more, he was asked top bear more. It was observed that Indian courts do not merely administer the common law but decide disputes in accordance with equity, justice and good conscience. For the purpose of contribution, it is desirable to differentiate between persons who are jointly held liable. A burden which law imposes on several persons shall not be borne by one alone.

The Supreme Court has also held in ***K.S.Gandhi V.N.A.Guzder*** **(A.I.R. 1970)** that in a suit against a number of joint tortfeasors compromise with one of the defendants, will not release the other joint tortfeasors, if the plaintiff had not obtained full satisfaction. In view of the Supreme Court ruling the Madras High Court ruling seems not acceptable.

Check Your Progress

5. What is meant by Abatement of nuisance?

4. Abatement of nuisance: Every one is entitled to abate or remove nuisance caused to him by another. You may cut the overhanging branch of a tree and deliver the same to the owner and thus, abate the nuisance caused to you.

(Space for Hints) But, if you appropriate the fruits from the over hanging branch you have cut and removed, and return the rest, you will be held liable to the owner.

5. Distress damage feasant: The simple meaning of the term is to detain the thing causing damage. If you find in your land any cattle causing damage, you are entitled to seize and Retain it (subject to the limitation imposed by the **Cattle Trespass Acts, 1871 & 1973)** to compel the owner of the cattle to compensate you for the damage caused. You need not release it until he compensate you the loss. The exercise of this remedy must take place in the distrainer's land. You have no right to follow it and re-capture when the cattle escapes, e.g., the distress must be taken at the *time the damage is done and while animals are on the land.*

Irrecoverable damage: In the following cases damages are irrecoverable

1. Cases of Damnum sine injuria.

2. Damnum suffered by one person injuria by another. Here the defendant is not liable because there is no duty owed by defendant to plaintiff. **Cattle Vs. Stockton Waterworks Company (1870) L.R. 10 Q. B.453).** The plaintiff undertook to construct a tunnel in the land of A.B, the owner of the neighboring land. While construction certain water works allowed the water to overflow over A's land as a result which the plaintiff had to incur additional expenditure which he claimed from B. The court rejected the claim and held that B owed on duty to the stranger contractor who come upon the neighbouring land for doing some work which he had contract to do there. Nor has he any greater interest in the land.

3. Damnum of a kind not recognized by law e.g, Under English Common Law no damages can be recovered for a death of a human being.

4. **Damnum too remote:** Under this, damages are irrecoverable for they are too remote a consequence of the defendant's act.

3.10. REMOTENESS OF DAMAGE

Introduction: Salmond classifies all the cases, where a plantiff who has suffered damage in consequence of the act of the defendant may be disentitled to recover compensation (1) Because the defendants act was not wrongful at all.

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These are cases of *damnum sine injuria* 2) Because the plaintiff is not the person to whom the defendant owed the duty which he has violated. These are cases where *damnum* is suffered by one person and injuria by another. 3) Because the damage is not of kind recognized by law e.g., no damage can be recovered for death in a common law. 4) Because the damage has been caused in a manner which the law does not recognise as a sufficient ground of liability. These are cases where *damnum* is too remote and therefore irrecoverable. It is this fourth class we are going to discuss here. Under this, damages are irrecoverable because they are deemed to be too remote a consequence of defendant's conduct. The chain of causation between the defendant's act and the plaintiffs injury must be directly connected. Though every one is presumed to have intended the natural and probable consequences of his act, he cannot be held liable ad infinitum for all the consequences which do not immediately and necessarily flow from it, is such which could not reasonably foreseen of his acts, however wrongful they may be. Accordingly, court of law does not take into account everything that flows from the defendant's wrongful act. This is expressed in the latin maximum. *Injure non remota causa sed proxima spectatur.* This simple meaning of this maxim, is that in law, the immediate and not the remote cause or an events is regarded. Under this liability is founded on act which is the direct or immediate cause of the injury complained of : "It were infinite for the law to consider the cause of cause .... therefore its contententh itself with the immediate cause ..." But a casual connection between the two is not sufficiently direct and hence no liability. Originally, with regard to remoteness, the view prevailed was that consequences are too remote if a reasonable man would not have foreseen them.

Let me once again quote the rule of law, which is , that the wrongful act, to render the defendant liable, must be the *Causa Causans*, or the *proximate* cause of the injury and not merely as the *causa sine que non. Causa Causans* or the cause of causes is the real cause, whereas sine qua non is the causes, without which, the event or the consequence would not have happened. Supposing X pushes V, who falls on a stone left there negligently by Z, which causes an injury to V then X's pushing V is the *Cause Causans*, while the presence of the stone on the spot V's fell is the *causa sine qua* non or the cause without which the event

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would not have happened. In *Vendenburg Vs. Truax-chasing with pick axe* case defendant was quarreling with the plaintiffs servant, he took hold of a pick axe and went after the servant who ran into his maser's store in order to hide under the counter. Knocked down a cask of wine was split. Held the defendant responsible for the loss of the wine.

Culpability and Compensation: Before fixing liability on the defendant two questions are posed before the court namely: (1) The question of culpability of the defendant. Is there a breach of legal duty? Has the defendant committed a tort? The question must be answered on the basis of foresight of a reasonable man, and (2) for what consequences or the loss can plaintiff recover?

Law Prior to Re Polemis : Before the Re Polemis case (1921) was decided, both the above said questions were answered solely on the basis of what is known as the *test of reasonable or the test of probability*, as laid down in **Rigby V. Hewitt.** (1850) and ***Sharp V.Powell* (1872).** According to this rule a wrong-doer was responsible only of damage which he intended, or the natural and probable consequence of his act. Natural and probable consequences are those which a reasonable man would have foreseen in the place of the wrong-doer.

The Law laid down in rePolemis Case: The view prevailed till 1921, was rejected by the Privy Council in the famous case of **Re Polemis (Polemi's Vs. Furnees Withy and Co., (1921) 3 K. B. 560)** and the test of direct consequence was laid down. According to this, if a reasonable man would have foreseen any damage as likely to result from his act, the defendant would be liable for all the direct consequences of it whether a reasonable man would have foreseen them or not. In this case a steamship called Thrasyvoulos, was totally lost in a fire caused by a spark produced by the fall of a plank in the midst of benzene oil tins. The plank was negligently placed by the servants of Furness Withy and Company, who were the charter of the ship. The Plaintiff brought an action for damages for loss of the ship. The Court of Appeal held the defendants, the charterers, liable to pay £. 200000.

The total destruction of the steamship was unexpected and abnormal consequence of the fall of the plank. Although every one would have expected

some damage, no reasonable man placed in the situation would have anticipated damage of, that magnitude. Yet charterers were held liable for all the consequences of their servants negligent act. It was further held that once the act is proved negligent the anticipation of the party is quite irrelevant. The test of reasonable foresight may be relevant to determine culpability of the defendant's but no compensation. Once culpability is decided, anticipation is totally immaterial to decide compensation. In other words, if the defendant is the wrong doer he is liable for all the consequences of his wrongful act.

In the words of Lord Summer, **(Weld Blundell Vs. Stephens 1930 A.C. 956)** What the defendant ought to have anticipated as a reasonable man is material when question is whether or not he was guilty of negligence, that is, want of due care according to the circumstances. This however goes to culpability and not to compensation.

The question whether the defendant is legally liable for having caused injury to the plaintiff is a question concerning culpability, while the question as to how much the defendant must pay to the plaintiff by way of damages is a question of compensation. The one is concerned with the responsibility (culpability) and the other compensation.

Regarding remoteness of damage, the direct cause was used so as to signify the relation that must exist between the act of the defendant and the damage suffered by the plaintiff. Thus, if the defendant's act is only an indirect cause the damage is too remote and irrecoverable. In *Re Polemis*, the degree of remoteness required by law for the purpose of disentitling the plaintiff to recover damages was not made clear. For a totally extrinsic cause, unconnected with the act of the defendant which he would not have foreseen as the cause of damage to plaintiff would have made the whole or part of the loss remote. All these aspects have been considered, and the House of Lords made clear as to what is direct damage of the defendant's act and what is remote damage in ***Liebisch Dredger V. Edison*** (1933).

In this case the plaintiff dredger was sunk by the negligent act of the defendant's steamship, Edison. For want of funds, the plaintiff could not replace

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the dredger but was forced to hire another dredger at an exorbitant rate to complete a work which had undertaken to complete within a stipulated period. Held that plaintiff could recover only the market price at the time of loss of the sunken dredger, loss due to suspension of work, the cost of transporting a new dredger and the interest thereon, but not the increased loss suffered due to the plaintiffs impecuniosity's. That is extra damage incurred as a result of financial difficulty of the plaintiff to purchase a new dredger was held a damage too remote.

Thuvogood Vs. Van den Berghsu and Jurgens: (1951) In this case the rule in Re Polemis was affirmed by the Court of Appeal. The plaintiff in this case was an employee of the defendant. While the plaintiff was kneeling beside an electric fan removed from its usual place and laid on the floor for testing, he got his hand caught in the revolving blades and seriously injured some of the fingers. It was observed that damage of some kind could be reasonably anticipated as likely to result from the defendant's act. However, damages were allowed although his employer could not have anticipated that a trained mechanic like the plaintiff would have allowed his hand to come into contact with the revolving pan.

But, it is interesting to note that the test of direct cause has been given up and again the test of reasonable foresight, or foreseeability test, has been revived by the Privy Council in the **Wagon Mound Case No.1** (1961).

Overseas Tankship (U.K.) Ltd. V. Morts Dock Engineering Co. Ltd. **(The Wagon Mound case No.1) 1961**. In this case, as a result of negligence on the part of the servants of Overseas Tankship Company the charterers demise of the Wagon Mound, an oil bringing vessel, fuel oil was spilt on to water. This soon spread to the wharf belonging Morts Dock Engineering Company about 600 ft, away, where repairing works including welding operations of ship Cosimal was being carried on. As a result of fall of molten metal while in the course of welding the oil caught fire and extensive damage was caused to their wharf on the basis of negligence the courts below reached the conclusion that it was unforeseeable that fuel oil spread on water would catch fire and that the defendant also did not know the same. But held the defendant liable following Re

Polemis. On appeal by the defendant, the Privy Council rejected the test of direct cause laid down in Re Polemis as good law, adopted the reasonable foresight theory and held the defendant not liable. Thus the plaintiff lost the claim on the ground that damage caused to them was too foreseeable.

Viscount Simonds observed as follows: 'Enough has been said to show that the authority of Polemis has been severely shaken though lip services has been from time to time paid to it. In their Lordship's opinion it should no longer be regarded as good law ... It does not seem consonant with current ideas of justice or morality that, for an act of Negligence, however slight or venial which results in some Erivial foreseeable damage, the actor should be liable for all consequences, however unforeseeable and however grave so long as they can be said to be 'direct'. It is a principle of civil liability, subject only to qualifications which have no present relevance. That a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilized order requires the observance of a minimum standard of behaviour. Thus it is that, over and again it has appended that liability for consequence has been imposed on the ground that it was reasonable or alternatively on the ground that it was natural or necessary or probable'.

After condemning the rule in Re Polmis as irrelevant and strange the learned judge again observed: 'After the event even a fool is wiser. Yet it is not the hindsight of a fool, but it is the foresight of a reasonable man which alone can determine responsibility. **Wagon Mound Case N.2:** ***Overseas Tankship U.K.Ltd. V. Millers steamship*** **Co (p) Ltd. (1966) AII. E.R.(P.C) 709 :** In this case on the same facts of Wagon Mound case no 1. Miller steamship company brought an action passed or nuisance or negligence for extensive damage caused by the fire to their ships undergoing repair work.

The trial judge found that the officer of the Wagon Mound would regard furnace oil as being very difficult to ignite on waters. Therefore, he found that damage to the vessels was not reasonably foreseeable and in regard to the issue negligence he gave judgment against the plaintiff. But with regard to the issue of nuisance he found that liability did not depend on foreseeability and gave judgment for the plaintiff on that issue.

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It is interesting to note that when the case reached the Privy Council, it held that the damage were foreseeable. It also observed that a reasonable man would not think it justifiable to neglect to take steps to eliminate the risk. Thus negligence for which the appellant Overseas Tankship Company was vicariously responsible was established. Therefore the Privy Council held the Company liable on the ground of negligence. In other words damages were not too remote, for the plaintiff to recover.

A critical note on Wagon Mound Cases: It must be noted that in Wagon Mound No.1. the Privy Council was not concerned with the degree of foreseeability because of the finding that fire was not foreseeable at all. But in Wagon Mound No.2. it was found that some risk of fire would have been preset to the mind of a reasonable man. It was also clear that a reasonable man would have foreseen and prevented the risk and there fore the appellant was held liable for damages in Wagon Mound No.2.

The rule in Wagon Mound NO.1. was approved by the House of Lords in **Hughes Vs. Lords Advocates (1963)1 All E.R.705.** Here postal employees opened a manhole in the evening in a public street for repairing a telephone cable and negligently left it unattended by a watchmen but whom put a shelter tent over the opening with rest lights. Two boys picked up one of the lamps and while trying to go down into the deep pit on a ladder. The lamp fell from the boy's hand thereafter' as a result of an explosion caused, the boy fell down into the pit and received very serious burn injuries.

In an action brought on behalf of the boy it was contended that the explosion which caused the injury to the boy was unexpected that unforeseeable and so the defendant's ought not to be held liable. But the House of Lords held that the defendants liable on the ground that in the circumstances of the case it was foreseeable that the boy aged eight enter the shelter and play with the lamps and this might result in injury from burns. That the occurrence of explosion could not reasonably have been foreseen did not absolve the defendants from liability.

Intended consequence are not considered too remote: Where a person does an act with the intention of doing it, he is presumed to have intended the necessary consequences also. If it established that A intended to injure B

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damages is not considered too remote. In other words intended consequences will never be considered too remote.

In some cases law will presume intention though the act concerned was done without the intention of doing it. There are cases where law imputes intention.and takes that he intended the natural and probable consequences of his act. This can be illustrated by the famous Squib case (1773) **Scott v.Shepherd** (1773) Shepherd mischievously threw it away and it fell upon Yates who also threw it away. Ultimately it fell upon the plaintiff, the squib exploded and put out one of his eyes, Held: the defendant's act was a direct and immediate cause of injury to the plaintiff. In other words, it was proximate and not a remote cause of damage.

Its is interesting to note in this case that defendant did not tend to hit the plaintiff. Nevertheless he was also held liable to the plaintiff. This is because law insists quite rightly that fools and mischievous persons must answer for consequences which common sense most unhesitating attributes to their wrong doing. Now I recall your attention to the principle of law explained earlier that law imputes intention in some cases and that once intention to injure the plaintiff is evident that disposes of any question of remoteness of damage that is the defendant is liable in such cases. Where damage is neither the necessary nor the probable result to the defendant's act, nor can it be shown to have been in his contemplation When he commuted the act for instance in **Sharp v. Powell** the defendant's servant in violation of a Police Act washed a van on the street and allowed the water to run down the gutter leading to a sewer. But due to extreme cold the grating to the sewer was blocked by frozen ice. So the waste water flooded over at the portion of the causeway which was uneven and there froze. he plaintiffs horse which was led that way slipped on the ice and broke its leg. It was held that this was a consequence too remote to be attributed to the wrongdoing of the defendant.

In those cases where plaintiff himself to be blamed: **Glover Vs. London and South Western Rly (1866).** A railway passenger misplaced his ticket. He was wrongly charged but removed with no more force than necessary for that purpose from the carriage. He failed to remove his pair of race glasses in the

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carriage and lost it. Held the damage was too remote; it was not a consequence of the removal but was owing to the passenger's negligence or carelessness.

When the tort is one of strict liability: Here the being of remoteness is directness and not foresight in liability for dangerous animals. When the claim is for Breach of a strict statutory duty. Here foresight of consequences is irrelevant e.g. failure to fence dangerous machinery. When the claim is for fraud: All actual damage directly flowing from the fraud has to be paid by the defendant..

When the damage which has been caused is damage of the same type or kind that might have been foreseen, but is greater in amount than could have been foreseen: The 'eggshell skull' rule According to this rule so far as physical condition of the victim is concerned abnormal circumstance existing at the time of the wrongful act do not negative causal connection. So if the consequence of a slight injury are aggravated by the state of health of the person injured. The defendant will be liable to the whole extent of the injury, though he had no knowledge of the victim. The Wagon Mound case does not affect this rule.

We have seen that a court of law does not take into account all the innumerable effects brought about by the defendant's wrong doing, but only takes note of the consequences reasonably foreseeable and hold him liable only for those and all other consequences are left out as too remote of the defendant's wrongful act so as to make him liable. This remoteness would have been brought about by factors extraneous or not traceable to the defendant's act. Now, one of the instances under which damage is considered too remote is the intervening act of a third party. This aspect is signified by the expression Nouvus Actus Interveniens or nova Interventions.

Novus Actus Interveniens: The simple meaning of this expression is a new intervening act of a third party. Such a new intervening act may not, break the chain of causation between the defendant's act and the plaintiff's damage. Where the chain of causation is broken by the new intervening act, the damage will be considered too remote. But, where the new intervening act does not break the chain of causation, damage will not be considered too remote. Under this, even though. A is at fault, he is not responsible for injury to C which B, stranger

Check Your Progress

5. Explain Novus Actus Interveniens?

to him, deliberately chooses to do. No doubt A would have given the occasion for B's mischievous activity; B then become a new and independent cause thereby. B snaps the chain of causation and isolates A from C. thus, if by the new intervening act the chain of causation is broken the original wrongdoer will be relieved from liability and if the chain of causation is not broken he is held liable.

In the following cases the chain of causation is considered broken and the consequences are too remote, 1. Wilful wrong doing 2. Negligent act, and 3. Lawful act of third party.

Wilful wrong doing: Defendant will be liable only when he has actually authorized or instigated the intervening act or omission. He will also be liable, if he has intentionally induced or procured the intervening act by patting the necessary means, opportunity or inducement in the way of him who does it. An illustrative case on the point is **Cobb v Great Western Railway Co.** (1823). The defendant company therein negligently allowed a railway carriage to be overcrowded. While the plaintiff was travelling in that compartment he was robbed. Held damage was too remote because of the intervening act of one willful wrong doer. In other words a new intervening act of a third party which is a willful act of wrong doing will break the chain of original causation.

Negligent Act: The appropriate case on the point is **Singleton Abbey v.Paludina** (1927). In this case the plaintiff field a suit for damages suffered to his ship in a collision of three ships. The suit was dismissed on the ground that the damaged claimed were too remote a consequence of the defendant's ship.

The three ships involved in the collision were Paludina, Singleton Abbey and Sara. While they were lying in anchors Paludina, by her negligence dragged her anchor and fell upon Singleton Abbey, which in turn struck against Sara and cast her also adrift. As a result of the collision Sara was sunk after having struck against the propeller of Singleton Abbey and damaged it. Action was brought by the owners of Singleton Abbey for damages for loss of propeller against Paludina. Held though Paludina's negeligence had created the occasion for the damage of Singleton Abbey, damage was not directly caused by it that the new intervening negligent act of Sara made the damage too remote. That is to say new

intervening negligent act of Sara broke the original chain of causation between Pauldina and Singleton Abbey.

Lawful act of third party: The rule is that where a lawful act of a third party is the novus actus, the original chain of causation is broken and the original wrong-doer is not liable. In **Harnett v. Bond,** 1925, the plaintiff herein, detained as a lunatic, was released on trial. Bond, the Commissioner of Lunacy, after having inspected him informed the manager that he was unfit to be released and detained him until after three hours he was taken over by the manager, who detanined the lunatic for 9 years. He then escaped and sued the owner of the asylum and Bond. The court held the Commissioner liable for falsely imprisoning the plaintiff for three hours but not for the lawful detention made by the owner of the asylum for 9 years. In this case, the lawful act was the intervening act of the owner which was held to have broken the chain of the original causation between the Commissioner of Lunacy and the owner of the lunatic asylum.

Metropolition Railway Vs. Jackson (1887) Jackson was traveling by train and at a particular station there was heavy rush of passengers into his compartment and it became overcrowded. There was great rush in the next station also. To prevent further entrance of persons into his compartment. Jackson put his hand on the edge of the door and stood across it. But when the porter shut the door his thumb was crushed for which be brought an action.

House of Lords held that the damage claimed by the plaintiff was too remote a consequence of the Railway Company's negligence. The court found, though the company's servants were negligent in allowing the compartment to become overcrowded, there was no negligence at the subsequent station and the porter's act at the station was reasonable and natural; as all the doors had to be closed since the train was approaching a tunnel, that, the porter would have done the same thing if the compartment contained only a few passengers and was not overcrowded. Therefore, plaintiffs injury could not be attributed to the initial negligence of the company.

Thus, you will find that the law is as follows: Thus liability is imposed on the defendant for all these consequence which follow his action unbroken natural sequence but, of course, without the intervention of external forces.

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Weld Blundell Vs. Stephens (1920 A.C.956): The plaintiff here instructed the defendant to investigate the affairs of a company. The instruction contained a libelous statement concerning two officers of the company. The defendant gave the same to his partner, who negligently left in the company's office. The manager of the company who read the letter communicated its contents to the officers who proceeded against the plaintiff and recovered compensation from him. The present action is brought by the plaintiff for damage from the defendant for breach of duty to keep secret the letter of instructions. The House of Lords held that the claim was too remote, the decisive cause being the plaintiffs own act. But he was allowed a nominal sum to be recovered from the defendant for his technical breach of duty to keep the letter secret.

Mc. Kew Vs. Holland: In this case the House of Lords dismissed the plaintiffs claim for damages for a second injury sustained after the first one, holding that the chain of causation between the first and the second injury has been broken of by the novus actus of the plaintiff which was unreasonable conduct of jumping down the stairs. The facts of the case are as follows.

The appellant (plaintiff) sustained trivial injuries by the fault of the respondents. His back and hips were badly strained and as a result of that at one occasion his left leg gave way beneath his hip. One day, the appellant, while descending steep stairs without a handrail and without any adult assistance, tried to jump so that he would land in a standing position rather than falling over down the stairs. While so landing he suffered a severe fracture of the angle. The question was whether the respondents were liable for the injustice caused by the second accident. It was held that the appellant's conduct of jumping was abnormal and unreasonable and the chain of causation was broken by the said act the respondents not liable for damages.

3.11. NOVUS ACTUS INTERVENIENS

1. Novus actus and contractual duties: Liability for consequences caused by new intervening act sometimes depends upon the terms of contract. Terms include implied terms also.

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Illustrations: A delivered a watch to B, a watch mechanic for effecting certain repairs. In law under contract of bailment B is bound to use due care for the safety of the watch. If for want of care the watch is lost by theft, he cannot set up the defence that the immediate cause flows was the willful wrong doing on the part of the thief.

In London Joint Stock Bank v. Macmillan (1918) it was held that a customer of a bank owes to the bank a contractual duty to take care while drawing claques as not facilitate committing forgery or to increase the amount. The customer in this case drew a cheque for £ 2 in such a way as to facilitate his clerk to alter the amount to £ 120 and abscond with it. In an action brought by the customer against the banker, it was held that the customer had not to bear the loss. The criminal act of the clerk was not a direct consequence of the loss it was a consequence in respect of which the customer should have foreseen and avoided.

2. **Novas actus in pursuance of duty :** In this class of cases , where the person intervened is under compulsion of duty whether legal or moral consequences are treated as direct. the commonest examples is the rescue cases.

Illustration: A seeing his child in peril from a runaway horse in spired by his parental affection attempts to hold the horse's rein, while so doing he was injured. The question arises whether B the owner of the horse would be liable to A.

It must be noted that,, it does not matter whether the person endangered is one to whom A owes a duty of protection, as a member of his family or is a mere stranger to whom he owes no such special duty.

Illustration: A is injured while rescuing B from an emergence of danger to life created by the negligence of C, here C is liable to A. An incidental question is whether C can plead that A's conduct is a novus actus intervenien (new intervening act) which makes his injury too remote a consequences of is initial negligence. The only possible and probable answer is that C is liable to A, notwithstanding his new intervening act. This is because his new intervening act of rescuring B does not break the chain of original causation, or that it does not make the chain make his injury too remote consequence of C's initial negligence.

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This point is sufficiently dealt with in **Haynes v. Hardwood** (1935). The defendant's servant left his van and horses unattended in a crowded street, A boy threw a stone at them and horses bolted. The plaintiff, a police constable on duty felt that if nothing was done a woman and children would be in grave danger and at great personal risk, managed to stop both the horses but while doing so suffered very serious personal injuries. In an action brought by him against the defendant owner, the court held that he was entitled to recover damages.

Similar to this was the American case of **Langendorff v. Pennsylviunian Railway Co.,** A judgment against the Railway Company was upheld in this case, where a little child had been imperiled by a passing train through the company's negligence in not having a watchman at a level crossing; and the plaintiff bravely sprang to the child's rescue but was struck by the engine. The act at the present of the plaintiff was not only lawful but highly commendable nor was he in any legal sense responsible for the emergency that called for such prompt decision. The negligence of the railway company having no watchman and the unlawful rate of speed at which the rain was run were causes of the danger. There was but a fraction of a minute in which to resolve and act: and to require that a man so situated should and weigh the danger to himself and compare it with that overhanging the person to be rescued would be to deny the right of rescue altogether when the danger is imminent.

3. Novus actus in defence of rights: The question arises whether the new intervening act in exercise of defence of one's rights without intention to injure other will break the chain of causation. In **Clark V. Chambers** (1878) it was held that it will not break the original chain of causation. The defendants in this case illegally obstructed a high way by an iron spiked horizontal bar which was removed by a stranger, who put it upright on the foot path. When the plaintiff was walking there on a dark night, one of the spikes entered his eye. In an action brought by him, the court held that damage was not too remote and so held the defendants liable. This is a foreseeable consequence creating a source of danger.

Check Your Progress

7. Explain the facts of the squib case.

"The Squib Case" : When A threw a lighted squib into a market and it fell upon B who in turn threw it away. It fell upon C and C,D and E also repeated the same acts in their self protection. Ultimately it fell upon the plaintiff,

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exploded and injured one of his eyes. Held: the intervening acts of B,C,D and E in their own self-protection would not break the chain of causation between A and the plaintiffs injury.

4. Novus actus as could be reasonably anticipated: Under this, if the intervening act is one which could be reasonably anticipated the question arises whether the original wrong-doer is liable and his act will be treated as the direct cause.

Illustration: If a person goes up in a balloon and descends in the plaintiffs garden which is damaged by the crowed collected out of curiosity or help the defendant, the defendant is responsible for the consequences because he must have forseen what might happen **Guile v Swan** (1882).

R.V. Morree (1832): In this case the defendant used his premises as pigeon shooting ground and consequently, idle persons collected outside to shoot the escaping pigeons. The defendant was held liable for damage done by them though their presence was against his will.

5. Persons intervening not fully responsible: These are cases where the intervening act of the third party is not fully responsible for the loss and the defendant has foreseen this and therefore the chain of causation is not broken and the consequences are considered direct.

Lynch v. Nurdin (1841): Here the owner of the horse and cart left them unattended in the street. Some children started playing with cart and the plaintiff having entered into the cart another pulled the horse's bridle the horse moved on and the plaintiff fell down under the wheel and was injured. The owner was held liable to plaintiff.

You will find that persons intervening (A,B,C and D) were not fully responsible for the injury to the plaintiff but the defendant who first threw the lighted squib in the crowded market should have in the circumstance foreseen some injury to somebody and as such the defendant was rightly held liable to the ,plaintiff. That is the new intervening acts of A,B,C & D did break the chain of

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causation between the defendant's original wrong doing and the plaintiffs injury so as disentitle him for damages.

6. Novus actus and alternate danger: The defence of novus actus interveniens will not be a available for the defendants against the plaintiff who had been placed in a position of alternate danger and suffered injuries.

Thus, where as a result of defendant's wrong, the plaintiff is put in a danger requiring him in a moment to choose the course of action to be taken, even if his action turns out to be mistaken or injurious, will not break the chain of causation.

Just like the rescue cases these are situation requiring that a person to put in sudden imminent personal danger, must not be expected to exercise the same amount of coolness and wisdom which he would have displayed in the absence of such emergency.

Jones v. Boyce (1816): As a result of breaking of a defective rein the horse of the defendants stage coach ran away, As such, the plaintiff was placed in a perilous situation, "to jump or not to jump" and finally he jumped and was injured though the coach was not overturned, and he would not have been injured if he had sat still. In an action brought by the plaintiff, the defendant was held liable for the injuries suffered by the plaintiff.

Brandn v. Osfome (1924): In this case the husband and wife were injured. When they were in a shop as customers, a skylight in the roof was negligently broken. Though the wife was standing in the place of safety and she tried to drag her husband and got injured. In a claim filed by her, damages was allowed.

You will find that the same principle is applied in collision cases also. This aspect is clear from the case of The city of Loncola, As a result of a collision due to the negligence of the defendant, the plaintiff's ship was damaged and her compass and charts. The captain of the ship trying to take the ship to safety, the ship ran aground. Held the damage was not too remote, though the act of the captain (Plaintiff's servant) was the cause of ultimate loss of the ship. "The hand

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of the original wrong doer was still heavy on the ship and his wrong was not sole human agency determining her fortunes".

7. Novus actus and duty to mitigate loss : It is the duty of the plaintiff to minimize the loss and any reasonable act done with that object will not break the chain of causation.

Dee conservancy **Board v. Mc Connell** (1928) 2 K.B.158: Due to their own negligence, the defendant's Ketch sank and obstructed the navigation of the river of which the plaintiff's were conservators. Because the defendants abandoned the wreck, the plaintiff's had to spend £ 1,500 to have the wreck, cleared and the plaintiffs, by the present action sought to recover the said amount from the defendants. Held the plaintiffs could recover since they were interested in and bound to minimize the damage for the future.

Thus it is clear that the reasonable conduct of the plaintiff done in pursuance of his duty to minimize the loss will not disentitle him to recover damage because the said conduct will not break the chain of original causation.

8. Novus actus and concurent causes: It must be clearly borne in mind that doctrine of novus actus has no application where two direct causes occur and separate at the same time to a common result and each actor is responsible. The principle can be explained by the following case.

Burrows v. Match Gas & Coke Co (1872) L.R. 7 EX.96: The gas company negligently allowed gas to leak from a gas pipe fitted up by them in the plaintiffs shop. A gas-fitter employed by the plaintiff, to repair the leak negligently approached it with a lighted candle in his hand. Thereby an explosion was caused and plaintiff property damaged. Held, that the plaintiff had a good cause of action against the defendant gas company, that the negligence of the defendant was a continuing negligence though' no harm would have ensued form the defendant's negligent act but for the subsequent and independent negligence of the gas-fitter. This case has been approved in **Grant V. Sun Shipping Co** (1948) AC 549.

Successive actions on the same facts: The general rule based on public policy is that in the interest of the state there must be a finality for litigations. In other words, suits shall not be brought successively based on the same of action infinitum to the determent of State's interest. This principle of law is expressed in the maxim, **Interest republicate ut sit finis litium** (In the interest of the State there must be a finality for litigations). The rule, that more than one action will not lie on the same actions. It is therefore, necessary that all damages resulting from the same cause must be recovered in one and the same action. Here the cause of action is complete for the wholething". Best C.J., in **Richard v. Mellish** (1824). Therefore a man cannot bring a second action upon the same facts simply because his injury proves to be more serious than was thought when judgment was given, in **Fettar v. Beal** (1701). The plaintiff first recovered from the defendant, damages for beating him. Eight years later, the plaintiff brought another action for more serious injuries alleging that these injuries were the result of the original beating, which was dismissed on the ground that it was a novel action.

But in the following case more than one action is permitted and the above rule is inapplicable.

1. Where two distinct rights are violated: the above stated rule is not allocable. But a person can have two causes of action if the 'negligent act separated damage to his property and to his person so also there are two causes of action if no quite separate occasions a single act of negligence causes a person to suffer distinct injuries. The illustrative case on the point is **Brunsden v. Humphrey** (1884) 14 QSD 141. In this case, A was injured and his car damaged by the negligence of the defendant action was brough for personal injuries. Brown, L.J. observed that there was substantial difference between actions for personal injury and injury to property. If injury is caused to the leg with his trousers on, separate action would lie for trouser and leg. If the evidence required to support the first action is sufficient to support the second action also, there is only one cause of action and consequently only one suit can be field: this is the test to be applied to such cases.

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2. Where the injury is a continuing one: If A wrongfuly places something on B's land leaves it there, it is not a single act of trespass but is a continuing trespass giving rise to a fresh cause of action "de die in diem" successive actions can be brought for every fresh injury. This point can be illustrated from the facts of **Darely Main Colliery v. Mitchell** (1886) 11 App. Cases 127.

Facts of the case

Mitchell leased out his land to the defendant. The land subsided while the defendant was digging out coal. So, the plaintiff brought an action in 1863 and recovered damages for such subsidence. As a result of working in the neighboring coal mine another subsidence was caused in 1882. It was revealed, had the defendant left enough support for his land while digging out coal the second subsidence would not have occurred. Therefore, in the second action by Mitchell, the House of Lords allowed damages for the additional collapse of land and the same was deemed to have arisen out of the first.

It must be noted, the prospective damages by way of anticipation will not be awarded. Accordingly, in **West Letgh Collery Co v. Tonnl liff and Hamsyson Ltd.,** (1908 AC.27) it was held that the surface owner must wait until the injury by future subsidences caused. In other words, damages can be awarded only for what has already occurred.

3. Finally, the tort is actionable only on proof of special damage – Torts are actionable per se or on proof of special damage, Whereas more than one action is not possible in the former case, repeated action can be brought each time fresh damage occurs on successive wrongful acts.

Illustration: In England slander is actionable only on proof of special damage. Relying on certain false representations made by G, A dismissed B from his service for which B filed a suit against A and obtained damages. Thereafter, entered into the service of C who also dismissed him after having heard the reason for B's earlier dismissal by A in such cases, a second action may lie against C for the reason, namely, that the facts for dismissal of B, first A and then by C are not substantially the same, the test being whether the same facts required to establish the second is substantially same as the required for the first.

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It may well be that C's dismissal might be too remote a consequence from the original slander and the action may be dismissed on that ground.

Vicars v. Wilcocks (1808) : In this case, B was wrongfully dismissed by relying on the slanderous words of A, Held B has no cause of action against A because A is not responsible for C's unlawful act.

But for casual test: When several causes result in ensuring injury to plaintiff this test is adopted according to which the defendant's act will be considered as the cause of the plaintiff's injury only if such injury would not have occurred but for the conduct of the defendant. If the injury to the plaintiff would have occurred irrespective of the defendant's act or omission that such act or omission cannot be said to have been the cause of plaintiffs injury. **Bainer v. Chelsea and Kensingtor**, Hospital Management, (1968) 2W.L.,R.422. A night watchman presented himself at the Casualty Department of the defendant's hospital complaining of vomiting for a considerable time after drinking tea. The casualty medical officer instructed him to go home to sleep and call on his own doctor. After five hours he died from poisoning by arsenic which had been introduced into the tea. In an action brought by the deceased's window on the - ground that death resulted from the casualty Medical officer's negligence in not diagnosing or treating his sickness, held the defendants were not liable inspite of the fact that they owed a duty of skill and care and the casualty officer was negligent in not examining the deceased. But the plaintiff did not show that death would not have occurred if the deceased had been admitted to the ward and treated five hours before his death.

Where injury is caused by two acts successively damages will be assessed only on the basis of the loss caused by the second act. This point can be illustrated from **Kerry v. England** (1818) A.C. 742. In this case a druggist supplied tateremetic instead of bismuth for an attack of 'flu' to an already dying sick patient. The court reduced the damages to nil on the basis that the extent after emetic had not accelerated to any appreciable/already imminent death.

Merger of Tort in Felony. The old common law rule that felony "drowns the particular offence and private wrong" is expressed in the maxim merger of tort in felony. Accordingly, it was thought that there could not be a civil remedy,

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it is the natural reaction of every injured person to prosecute the criminal first and to have the wrong-doer clapped in prison and make him end his life in penal servitude. It is this ego of man that got it sanctioned gradually at the next stage namely, that a criminal prosecution is a condition precedent to the civil on the same cause of action.

Criminal Prosecution a condition precedent: According to this, where the same facts constitute a tort and a felony no action for damages can be brought by the plaintiff until the defendant has been prosecuted for the felony. The leading case, on this point is **Smift v. Selwyn** (1914) 3 K.B. 98. In this case. A sued the defendant for injuries caused to her by felonious administration of drugs to her. The suit was stayed until the defendant was prosecuted. "It is a well settled rule of law that a plaintiff against whom a felony has been committed by the defendant cannot make that Felony the foundation of a cause of action unless the defendant has been prosecuted or a reasonable excuse has been shown for his not having been prosecuted". Phillemore L.J.

If the defendant, in an action against him wished to raise objection that wrong complained of amounted to felony, the proper procedure is not to raise it as a defence but to make an application to the court to stay the action - **(Well v. Abrahmas 1872).**

The present rule: The present rule is that the civil remedy is not drowned but only suspended and that is clearly stated **in re Shepherd** (1879)2 Ch. D.667 as follows: The doctrine that it was a condition precedent to enforce the civil remedy that the felony should have been first prosecuted if ever it had any solid foundation was finally exploded". In the same line spoke Lord Wright: (**Rose v. Ford** (1837) A.C. 846) "Whatever the old law may have been the modern law is quite clear that if the act complained of constitutes a felony, the civil remedy is not drowned but merely suspended".

Thus, it is clear that the modern rule which demands only suspension and not destruction of the civil remedy is in keeping with the requirements of modern public policy.

The old Common law rule merger of tort in felony had the following exceptions:

1. This rule has no application unless the person sued for the tort is himself the actual wrong-doer. Thus, an action will lie against a master in respect of a felonious tort committed by his servant in the course of his employment. This was laid down in **Oborn vs. Gillerr (1873) L.R.S. (Ex. 85).**

White vs. Spettigue (1845) 13 M & W. 603. In this case it was held that an innocent receiver of stolen goods may be sued in trover although the actual thief has hot been prosecuted.

2. The rule does not apply, where the felony is committed not against the plaintiff and he is not in a position to prosecute the offender. In **Appleby vs. Franklin (1886)1 Q.B.D. 93,** it was held that a mother may sue in respect of seduction of her daughter and for loss of her service though it is the father and not the mother who is deemed to be aggrieved by the seduction.

3. The rule does not apply if the prosecution of the person become impossible inspite of duty on the part of the person whose duty it was to prosecute e.g. when the offender had died or escaped from jurisdiction before there has been any undue delay in commencing prosecution.

4. Finally the rule does not apply to action brought under the Fatal Accidents Act, 1849.

3.12. FOREIGN TORT:

A foreign tort is a tort committed in a foreign country. This is, the act complained of as a wrong should have taken place outside the territorial jurisdiction of the State in which the action is brought. (i) Such a tort may be a tort to reality (i.e) in the nature of injuy to land situated abroad, or (ii) a personal tort (i.e.) in the nature of an injury to the person or movable property. Courts are frequently called upon to decide cases in evolving such foreign elements.

Under this head, we study the various circumstances under which an action can be brought in the State for a tort committed beyond its territorial borders. For this purpose the State of Pakistan or Sri Lanka, is a foreign State.

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It is an essential requisite for the purpose of exercising jurisdiction that the defendant must be in the State. From English practice, the following rules can be formulated.

No action lies in England if the defendant's conduct is a tort is a trot in the foreign state (in which it was committed) but not a tort according to English law. The most illustrative case on the point is The Halley (1868). The Halley, a British ship under the navigation of a Belgian pilot in Belgian waters, collided with a Norwegian barge as a result of negligence on the part of the compulsory pilot. Foreign ships in Belgian water were to be compulsorily navigated by their pilots. But liability according to Belgian law rested with the ship owner. But according to the English law, the ship owner was not liable for the negligence of the compulsory pilot. In an action brought an England by the owner of the barge the court held the Halley was not liable. Regarding the decision, it has been said, that it satisfies the requirements of uniformity, in administration of justice within a State and the rule is that an act which is lawful shall not become wrongful for the simple reason that it is wrongful elsewhere.

2. No action lies in England, if the defendant's conduct is not a tort where it has been committed, but is tortuous according to English law. The leading case on the point is **Phillips Vs. Eyre (1870) L.R.** Eyre was the Governor of Jamaica and while putting down a rebellion assaulted and imprisoned the plaintiff. But an Act of Indemnity passed by the Parliament of Jamaica exempted liability and prohibited all civil actions in Jamaica, plaintiff brought an Eyre from action In England and the same was dismissed on the ground that the act was not illegal in Jamaica.

3. An action lies in England if the defendant's conduct is a tort in the state where it was committed and also tortious in England. The rule regarding maintainability of action in England for a tort committed outside England was formulated by Willes, J. in the leading case of **Phillips vs. Eyre,** as follows: "As a general rule,..... First, the wrong must be..... actionable if committed in England. .... Secondly, the act must not have been justifiable by the law of the place where it was done". Relying on the expression, as a general rule" of Willes, J., and by giving a narrow interpretation to it as if it permitted a 'flexible approach

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according to the requirements of social environment, the House of Lords made a slight twist in the law in **Chaplin v. Boys** Nevertheless, the fact remains that justifiable is a strange word and "actionable" should have been preferred in its place by Willes J.while formulating the rule. For an action to be maintainable in England, such injuries are actionable both by the law of England and by that of the country where they are committed "Per Selwyn L.J. in the **Halley Ship** case.

Chaplin vs. Boys (1969) 2 all E.R. 1085: The respondent (plaintiff) was injured in road accident by the admitted negligence of the appellant (defendant). Both the parties were British the parties were British servicemen stationed temporarily in Malta and were given a right to recover pecuniary loss, but no right to compensation for pain and suffering and the respondent would recover only £ 53 has special damages. But under English law damages would be over £ 2000.

The crucial issues were firstly, whether the tort was actionable in England and secondly, whether damages should be assessed according to English or Maltese law. The House of Lords unanimously held that the tort was actionable in England and that the respondent should recover a greater sum under English law. Usually matters relating to substantive law are decided according to the law of the place of occurrence and matters of procedure are taken from that of the forum, the place where the suit is field. But damages were assessed according to law of the forum (English law) since the place of tort was overshadowed by the identity and circumstances of the parties.

Tort committed on ship and celestial bodies : If an act is done aboard the ship on the high sea, the law of the country whose flag the ship is flying determines whether the act is tort us or not. The same principle is applicable to "a tort committed in an aircraft. But the law concerning a tort committed in celestial bodies is still in embryo-stage and at this stage we cannot say anything with certainly.

But difficulty may arise as to the place of occurrence of the wrongful act from which the damage flows. As for example, where injury was inflicted in New South Wales and death took place in Victoria, the High Court of Australia in

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Koop vs. Bubb (1952 Aus L.R. 37). held New South Wales as the place of occurrence and that it was in New South Wales the first wrongful act was done.

3.13. EFFECT OF DEATH OF PARTIES IN TORTS

Death puts an end to the physical and legal existence of parties to a tort. When we take up the study of discharge of torts, you will find that death is one of the modes of discharge of torts too.

Death will have a two fold effect whether death occurs to the person who caused or suffered injury, may extinguish liability or create liability.

Illustration: If A brings an action for damage against B for personal defamation, the death of A or B while pending action will extinguish the liability of B against A for the simple reason that is expressed in the maxim **"action personalis moritur cum persona"**. But where A instituted a suit for the establishment of a right of way to his property over the adjoining land of B, the action survives even after the death of parties. The legal representatives of both the parties can continue the action. Thus main aspect of the question in relation to death as extinguishing liability is whether there is survival of action. In other words whether the cause of action survives to the survivors.

Death creating liability: Where the death of A is caused by the negligen driving of B, A's widow can bring an action for damages for the material loss and suffering caused to her and to her children by the act of B. The wife and children of a were hitherto totally depending on A for their maintenance and by the negligence of B, they were deprived of their sole means of support. The Fatal Accidents Act enabled certain near relations of the deceased persons to bring action claiming damages in their own behalf against the wrong doer. In this kind of cases, the claimants really acquire a new right on account of the death of their supporter in life. That is why it is said that death creates new rights in other persons. The sole enquiry under this is whether causing the death of another would constitute a tort. The distinction between the two approaches is whether a cause of action survives the death of a person injured and whether of a person gives any right of action for damages to his near relatives. This aspect must be remembered throughout this enquiry.

Check Your Progress

8. What is the effect of death of parties in Torts?

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Survivorship of action: In regard to this, the common law rule was that on the death of a person all the claims for damages either for or against him also come to an end. The origin of this rule is often traced to the latin maxim, **actio personalis moritur cum persona.** Personal action ends with the death of a person. According to Winfield, the reason for non-survivorship of action is that "nobody ought to be liable for it expect the man who committed it".

There are some exceptions to the of non survivorship of personal action both at common law and by statutes.

Common law exception :

1. Breach of Contract : When the defendant's conduct resulted in breach of contract this rule was not applied. Ever since 1611 this maxim was not applied to actions based on contract but was confined only to tort, e.g. breach of promise to marry. It is said that "death is no discharge of debt".

2. Wrongful appropriation of another's property: Where, as a result of the wrongful act of the deceased the tort feasor's estate has been enriched action can be continued against his estate: **Sherrington Case (1682).** In this case the executors of the deceased tort feasors were held chargeable for 100 Oaks trees and 20 oxen which the testator had wrongfully taken away from the claimant's land.

It is not necessary that the property wrongfully converted or appropriated should still remain as part of the wrong-doer's estate. **Phillips Vs. Homfray** (1883). Here the defendant had worked and taken the coal from the plaintiffs mine. It was held that on his death action could be continued against his representatives for the value of the coal wrongfully taken.

3.14. STATUTORY EXCEPTIONS

There were a series of enactments passed commencing from 1830 such as Civil Procedure Act, 1883 Fatal Accidents Act 1846 Employers Liability Act 1880. Administration of Estates Act (1935), etc., personal representatives were allowed to bring actions for wrongs affecting property. They did not enable the representatives of the deceased workman to recover medical expenses or loss of wages: nor was any damages recoverable for defamation. Therefore it was said

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that "it was cheaper to kill than to maim or cripple". Therefore to remedy several (evils of this kind the Law Reform. Act, 1934 was passed. This act extended the survival of action of torts affecting the person subject to certain limitations.

The Law Reform (Miscellaneous Provisions) Act, 1934: This Act completely abolished the rule of non-survivorship of action based on action (based on acts personalis moritur cum persona) provided that on the death of a person the cause of action vested in him shall survive for the benefits of his estate. But actions for defamation seduction, inducing one's spouse to leave or remain apart form the other and claim for damage for adultery were exempted.

According to this, all cause of action vested in A, or subsisting against him would survive the death of A for the benefit or detriment of A's estate.

Illustration: A is negligently knocked down by B. Causing serious personal injuries to A. Here, a cause of action would certainly have vested in A. This cause of action can be continued by the legal representation of A even after A's death subsequent to his having been injured. What the legal representatives of A acquire is not a new right on account of A's death, but it is a right to continue the action which had already vested in A before his death. The leading case on the point is **Rose Vs. Ford (1937).** Mable Alice Rose, aged twenty three years, was severely injured in a motor accident due to the negligence of the defendant. Two days later her right leg was amputated. She died four days after the accident as a result of the injuries and throughout these days till her death she remained unconscious.

The plaintiff, father of the deceased Rose, sued for compensation under the Law Reform Act, 1934 for deceased's (a) pain and suffering (b) loss of her leg and (C) shortening of her expectation of life. The Court of Appeal while allowing the damages under the first two heads held that the father was disentitled to damages under the third head because of the rule in **Baker Vs. Bolton.** On appeal the House of Lords, held that there was vested in the deceased before her death a cause of action which entitled her to sue for loss of expectation of life and under the Act, 1934 that cause of action survived to the survivors and the same is enforceable by her personal representative, the father.

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Flint vs. Lovell (1935) : The Court of Appeal in this case for the first time granted damages for shortened expectation of life of Plaintiff, aged 70 years sustained serious personal injuries through the defendant's negligence and his expectation of life was considerably diminished. The Court of Appeal awarded £ 4,400 damage for shortened expectation of life.

This case was followed by the House of Lords in the leading case of **Rose Vs. Ford** to allow compensation for shortening of expectation of life though the injured person was dead holding there by that principle is not confined to the case where the injured is alive on the date of action.

Death creating liability: Under the common law it is not a tort to kill a person. This is know as in the **Baker vs.Bolton (1808).** "In a civil court" the death of human being could no be complained of as injury" - Lord Ellenborough.

The plaintiff and his wife were passengers on top of the defendant's stage coach. As a result of the defendant's negligence the coach over turned and plaintiff, was bruised and his wife was injured and she died about a month later. The plaintiff was awarded £100 for his own bruises but nothing was given for his wife's death. It was held that infliction of death as such was not a tort against the person killed. The tort was alleged to have merged in the crime. It was already been brought to your notice that in such cases what really happens is not complete merging of the tort in the crime but only suspension of the remedy in tort.

Therefore, if A kills B,C who had an interest in the continuance of B's life cannot recover damages against A for the death of B, **Osbron Vs. Gillett 1873** in this case the father sued for the death of his daughter as a result of negligent driving on the part of the defendant's servant. Held, that the plaintiff was not entitled to damages.

The rule **Baker Vs. Balton** was confirmed by the Court of Appeal in **Clark vs. London General Omnibus Co Ltd (1960)** where the claim for funeral expenses was defended on the ground that a father was bound to bury his daughter. The House of Lords also upheld the rule in **Baker vs. Bolton in Admiralty Commissioners Vs. S.S. America.**

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Exceptions

There are some exception to this rule both at Common law and by Statute. **Exception in Common Law** – The rule in **Baker Vs. Bolton** does not apply where the action is based on breach of contract for loss of services by death the plaintiff and the person who caused death. This point can be illustrated from the facts of **Jackson vs. Watson (1909)**. The plaintiff in this case purchased from the defend an tinned salmon. His wife ate a few and died. Therefore, the plaintiff sued for loss of her services. The Court of Appeal held that the action was maintenable because wife's death was not an essential part of the present action.

By Statute: Fatal accidents increased rapidly when railways were extended in England to different parts of the country and in many cases the old common law rule caused considerable hardship to the relations of injured persons who happened to die. If the injured person survived he could bring an action and get heavy damages against the wrong-doer. But in the case of injured person who died subsequently their relatives could not recover any amount by way of damages on account of the common law rule in **Baker Vs. Bolton.** Therefore, the rule was modified by the **Fatal Accident Act, 1946 (Lord Campell's Act).** This Act permitted the near relatives of the deceased to bring an action for damages for death of a human being if the deceased himself would have had a right of action had he been merely injured and not killed and if the relatives suffered any pecuniary loss in consequence of death. (The person entitled sue under this act have been further increased by the Law Reform Act, 1934).

The Campell's Act undoubtedly conferred new rights on the near relatives of the deceased. That is why it as been said that the Act created a new action "new in its species, new in quality, new in principle, in every way new". It was found in certain cases that the relatives could recover a much higher amount of damages than that could have ,been recovered by the deceased had been alive.

Aften Roach Vs. Yates (1938) : In this case, a brick-layers brain was affected by the fall of a stone on his head on account of the negligence of the defendants and later the brick-layer became a hopeless lunatic. Consequently his wife and his sister in law had to give up their employment to take care of the lunatic and the court awarded £ 6,000 by way of damages to the injured.

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Monetary compensation may not be a substitute for the life of a near relative. Besides, it is very difficult to assess damages in such cases by applying the standard of happiness. However, on this point. The House of Lords laid down some principles guidance to be followed in assessing damages while deciding **Benham vs. Gambling, (1941).** In this case father and administrator claimed damages under the Law Reform Act, 1934 for the loss of a 2 ½ years old child killed owing to the defendants negligence. The lower court awarded £ 200 and laid down the following principles.

1. Human life must be assumed to be advantageous and not disadvantageous. The thing to be valued is not the prospect of length of days of a predominantly happy life. Therefore, the statistical test is not to be applied thought it may be relevant in cases of extreme old age.

2. The capacity of the deceased to appreciate that his life would bring him happiness is irrelevant. The test to be applied is objective not subjective.

3. Damages are in respect of loss of life, not of loss of further pecuniary prospects.

4. Assessment of damages is a very difficult affair. Only moderate damages should be given While estimating compensation, the ups and down of life, its pains and sorrows, joys and pleasures have to be taken into consideration.

5. The degree of happiness to be attained by a human being does not depend on wealth and status. Therefore there is no reason why the sum to be awarded should be greater in one case than in another.

6. In the case of the very young child there is of necessity so much uncertainly about its future that no confident estimate of prospective happiness can be made, (It is on this ground that the House of Lords reduced the lower court's award).

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The Employer's Liability, Act 1883 vests rights in the personal representative of an employee who dies while in the employment of the employer for causes given under the Act to bring an action for compensation against the employer.

The Workmen's Compensation Act 1925: The defendants of a workman can claim compensation where the workman dies of injury which, if he had survived would have given him a claim to Compensation.

India Law: The common law maxim that personal action ends with the death of a person is not applicable in its entirety to India. The following Statutes have practically nullified the effects of the old rule.

1. Legal Representatives Suits Act, (1855): Under this Act an action may be maintained by the executors or administrators or representatives of the deceased person for any wrong committed in the life time of a deceased \which has occasioned pecuniary loss to the estate of such person committed within one year before his death. So also suits can be brought against the executor for wrong committed by him.

2. Fatal Accidents Act (1855): This Act permitted the legal representatives of a person whose death is caused by wrongful act to bring an action for the benefit of the window's husband or child of the deceased. Such suits must be brought within one year from the death of the deceased.

3. Indian Succession Act (1925): Under Sec.366 of this Act, the right to prosecute an action exacting in favour of the deceased survives to his executors or administrators except 1. defamation 2. assault as defined by the Indian Penal Code and 3. personal injuries not causing death of the party. So also right of action against the deceaseds survivors against his executors or administrators, except 1.defamation 2. assault as defined by the Indian Penal Code and 3. personal injuries not causing death of the party thereby meaning bodily injury as opposed to injuries to property.

3.15. SUMMARY

In this lesson so far we have seen various theories under the law of Torts. The liability of hospital authorities the joint tortfeasors and Independent

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tortfeasors has been analysed in this unit. Finally we have seen the two important case laws and adopted principle related to the remoteness of damage i.e. consequences test and the foreseeability test. The famous Re Polimis and Wagon Mounol Cases turning point to the development of law of Torts.

3.16. ANSWER TO CHECK YOUR PROGRESS

1. Refer 3.1
2. Refer 3.4
3. Refer 3.6
4. Refer 3.9
5. Refer 3.9
6. Refer 3.10
7. Refer 3.11
8. Refer 3.13

3.17. KEYWORDS

Succession	-	the right to succeed to a title (or) rank.
Fatal	-	causing ruin.
Vicariously	-	
harfinger	-	
solatium	-	

3.18. MODEL QUESTIONS

1. State the circumstances under which a master becomes liable for the acts of his servant. Discuss with leading cases.
2. Explain the rule of 'remotness of damages" with illustrations.
3. How does Winfield defined tortious liability, and enumerate its ingredients.
4. Classify joint and several tortfeasor. Under what circumstances can each torfeasor claim immunity and contribution from the other tortfeasors?

UNIT – 4

NEGLIGENCE

INTRODUCTION

Negligence has two meanings in law of torts. 1. A mental element in tortious liability and 2. an independent tort.

Negligence as a mode of committing certain torts eg., negligently or carelessly committing trespass, nuisance or defamation. In this context, it denotes the mental element.

Negligence as a tort is the breach of a legal duty to take care which results in damage, undesired by the defendant, to the plaintiff or it may mean an independent tort. In this unit we are going to explain depented with negligence as an independent tort. Now let us proceed to discuss the scope of negligence.

UNIT OBJECTIVES

- To understand what is 'Negligence'.
- To analyse the ingredients of the Negligence.
- To analyse the scope of Negligence and as specific tort or Mental Status of the other wrongs.
- To discuss about the contributory Negligence.

UNIT STRUCTURE

4.1 Negligence - is a mental status.

4.2 Negligence – as a separate tort.

4.3 Duty to take care

4.4 The Classical pronouncement on negligence.

4.5 Medical Negligence

4.6 Defences

4.7 Contributory Negligence

4.8 Summary

4.9 Answer to Check your progress

4.10 Key words

4.11 Model questions

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4.1. NEGLIGENCE AS A MENTAL STATUS

In the law of torts negligence has two meanings, namely (1) A mental element in tortious liability (2) An independent tort.

In the former sense, negligence denotes a mode of committing certain torts e.g. negligently or carelessly committing trespass nuisance or defamation. A person who does not desire the consequences of a certain act of his but is nevertheless indifferent or careless. Whether they happen or not, is guilty of negligence as a state of mind. The willful wrong doer is one who desire to do harm: the negligent wrong doer is one who does not sufficiently desire to avoid doing harm. Negligence and wrongful intent are inconsistent and mutually exclusive states of mind. A person who causes a result intentionally cannot also have caused it negligently.

But it must be noted that negligence may arise from non feasance, as well as, from misfeasance; whether there is a breach of a duty caused by the omission to do something which a reasonable man would do (or) doing. Something which a prudent and reasonable man would not do. An action for negligence is founded on an obligation or duty on the part of the defendant to use care and a breach of it resulting in an injury to the plaintiff. From this you must know that there cannot be liability for negligence unless there is a breach of duty. Law does not take cognizance of carelessness in the abstract. One can drive carelessly on a deserted road, but not on a crowded road, then a duty towards others arise not to drive in such a way as to cause injury to another or others.

Check Your Progress

1. Explain Negligence as an independent tort.

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4.2 NEGLIGENCE – AS A SEPARATE TORT

Negligence as a separate tort may be defined as unreasonable conduct, i.e. contact which, a reasonable man would avoid on the ground that it involves , risk of causing damage to another. A precise definition of negligence as a tort is given by Dr. Winfield as the breach of a legal duty to take care which results in damage, undesired by the defendant to the plaintiff". Analyzing this definition its essentials are: 1. that the defendant owed a duty of care to the plaintiff, 2. that the defendant committed a breach of that duty; 3. that in consequence there of the plaintiff suffered damage.

4.3. DUTY TO TAKE CARE

The concept of duty in the tort of negligence is so firmly rooted. That an action in negligence will fail when duty in the plaintiff is not established. It is not enough for the plaintiff to show that the defendant was careless; he must also show that the defendant was careless in breach of a duty owed by him to the plaintiff. It is said that a man is entitled to be as negligent as, he pleases towards the whole world if he owes no duty to them. There can be no liability in the absence of a (pre-requisite) duty.

To meet such new situation, a new principle was formulated by Lord Atkin in **Donoghue Vs. Stevenson (1932).** In this case, the plaintiff sustained injury by drinking the contents of a bottle of ginger-beer which contained the decomposed remains of dead snail. The bottle was of dark opaque glass and its contents could not be seen. It was purchased for the plaintiff by friend of her's in cafe and the friend poured out the contents into a glass for her to drink. This bottle' of ginger beer had been sold by its manufacture, who had sold it to a retailer, who in turn, sold it to the plaintiff's friend who was treating the plaintiff. The plaintiff alleged that/she became seriously ill in consequence of her having consumed a-part of the ginger beer in that bottle and sued the manufacturer for negligence. There was of course no contractual duty on the part of the manufacturer towards her, but a majority of the House of Lords held that he owed her, a duty to take care that the bottle did not contain noxious matter and that he would be liable if that duty was broken.

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This case is of great importance in the law of negligence. Earlier to this there was a fallacy, which was prevalent in the law of England that on account of the absence of a contractual liability on the manufacture's part to the Plaintiff, there could not be liable in tort also. This fallacy was done away with by **Donoghue Vs. Stenvenson** by allowing the consumer of the contaminated drink, to sue the manufacture in tort for negligence, though there was no contract between consumer and the manufacturer.

4.4. THE CLASSICAL PRONOUNCEMENT ON NEGLIGENCE

The Classical pronouncement provided a general formula "duty" by introducing' which is known as "neighbor test". The circumstances in which the duty to take care arises vary and so the formula, of "neighbor principle" has to be understood as general road side signal indicating the way in which the courts ought to proceed to determine if a duty is owed by the defendant to the plaintiff.

How then is one to ascertain who is one's neighbor? The test is not one of physical or geographical proximity but of foresight. It is the existence of some relationship between the parties such as that of manufacturer and consumer which makes the plaintiff the defendant's neighbour but the fact that the defendant ought reasonably to have plaintiff in contemplation when doing the acts or refraining from certain acts, which are acts of negligence. Whether the defendant owes a duty to the plaintiff or not depends on reasonable foreseeability of the injury to plaintiff. In other words, the scope of duty is limited to this extent, namely the obligation to refrain from particular conduct is owed only to those who are foresebly endangered by the conduct of the defendant.

Standard or degree of care: The norm of standard of care is fixed with reference to the conduct of a prudent man in a particular situation. While the standard remains the same, the degree of care may vary depending upon any given situation and the obviousness of the risk. If an unskilled man undertakes to do a piece of skilled work, his conduct may be said to be negligent. If the danger is slight, the only slight amount of care is necessary. So a man who has undertaken a higher degree of duty is bound to exercise more care than an ordinary prudent man.

Check Your Progress

2. What is meant by standard of care?

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Breach of Duty: The expression "duty to take care" mentioned before means that one should behave as a reasonably careful man would behave in similar circumstances. On the one hand a person cannot be made liable on the ground that he failed to take extraordinary care; and on the other it is no defence for a person whose conduct falls short of that conduct to say that he acted to the best of his judgment and ability.

The test for deciding whether there has been a breach of duty is the one laid down in the off-quoted dictum of Alderson J. in **Blyth Vs. Birmingham Water works Co. (1856)** "Negligence is the omission to do something which a reasonable man guided upon these considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do".

It is to be noted that the standard of foresight envisaged is objective and it is left to the judge to decide. What in the circumstances of the particular case, reasonable man would have had in contemplation and what accordingly the party sought to be made liable ought to have foreseen.

Home office Vs. Dorset Yacht Co Ltd., (1970) : A group of Borstal boys were working on an island in poole harbour. One night the boys escaped went aboard a Yacht, moored nearby and caused it to collide with the plaintiff's yacht, causing considerable damage to it. The plaintiff's sued the Home Office for the negligence of its officers, who were in charge of the Borstal boys and allowed them to escape. It was held that the Home office owed a duty of care to persons like the plaintiff and so was liable in negligence for damage done by escaping of Borstal boys.

In **Boltton Vs. Jones, (1951)** the plaintiff was standing on a suburban highway, outside her house. In a cricket ground, adjoining the highway, a bats man hit a ball, which went over a 17 feet fence 78 yards from the batsman and hit the plaintiff. Similar hits had occurred only about 6 times in the previous thirty years. The House of Lords considered that likelihood of injury to persons on the road was so slight that the cricket club was not negligent in not having taken precautions against it.

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In the case of **Municipal Corporation Delhi Vs. Susheela Devi and other AIR 1999 S.C. 1929,** on the facts on 18-8-1964 in the evening Suresh Sunder, and his brother Ramesh Sunder, were going on a Scooter from their office to their residence. When they were passing through Alipur Road, a branch of a Neem Tree, standing thereby suddenly broken down and fell on the head; Suresh Sunder who was driving the Scooter crushed to death. When the widow and children field compensation, the Division Bench held that, the Horticulture Department, of the Corporation should have carried out periodical inspection of the trees, and should have taken safety precautions, to see that the road was safe for its user and commits breach of duty and liable for damages.

In support of the above proposition, in **Habs Vs. Hants 1974 (2) ALL.E.R. 628.** The' branch' of a tree struck over the omni bus's window glass and a splint flew injured the passenger and it was held county Council was held liable for damages.

In another case in **M.S.Grewal and another Vs. Deepchand Sood and others 2002 (1) L.W.491 S.C.,** on facts, school children fifteen in numbers were on picnic and two teachers accompanied the students. Students when they were on picnic during boating drowned in the water. It was held, the teachers were negligent in taking care of children, failed to exercise proper care and skill. The school authorities as master liable to compensate the loss and it was held, the school was liable for the parents of the school children and to compensate the loss.

4.5. MEDICAL NEGLIGENCE

Doctors, surgeons and dentists owe to their patients a duty in tort, whether there is any contract with the patients or not. The standard of care that is expected of them is that they should show fair, reasonable and competent degree of skill. It is not required that they should we the highest degree of skill. Though the standard is a high one a surgeon should not be held negligent simply because one of the risks inherent in an operation of that kind occurs.

In **Roe Vs. Minister of Health (1954)** the facts are: In 1947, the plaintiff had been injected with nupercaine, a spinal anaesthetic, by specialist anaesthetic

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in order to undergo a minor operation. This medicine contained in glass ampoules which were in turn kept in a jar of phenol. Some of the phenol percolated through invisible cracks in the ampoules and contaminated the medicine. As a result of ' the injection, the plaintiff was permanently paralysed below the waist. The cracks in the ampoules, were not detectable by ordinary visual examination. The danger of percolation through invisible cracks in ampoules in which were kept drugs used for injection, had not be known in 1947. it was held, there was no negligence on the part of the anaesthetist.

In **Dr. Laxman Balakrishnan Jashi Vs. Dr. Timbak Babu Godbole (A.I.R. 1969)** a doctor tried to locate a fracture suffered by a patient without administering anesthetic to the patient. The patient suffered nervous shock as a result of the crude method of treatment adopted by the doctor and died. The Supreme Court held that the doctor was guilty of negligence. It was observed by Court: "A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for that purpose. Such a person when consulted by a patient a breach of this duty, viz, a duty of care in treating the patient, a breach of this duty gives a right of action for negligence to the patient. The practitioner must bring to the task reasonable degree of skill and knowledge and must exercise a reasonable degree of care. The Doctor, no doubt has a discretion, in choosing treatment which he proposes to give to the patient and such discretion is relatively ample in cases of emergency".

A surgeon has been held negligence for leaving a ware of surgical gauze in a patient's body after an operation.

In the case of Hospital negligence, the latest trend in law of Negligence is a doctor will not be negligent, if he has acted in accordance with the practice, accepted as proper by a responsible body of Medical men skilled in that particular art and it has acted with such practice, merely because there is body of opinion, that takes a contrary view, will not make him liable for negligence. This principle was laid down in **Smt. Vinitha Ashok Vs. Lakshmi Hospital and others, 2002(4) L.W.1. S.C.** On facts, Vinitha claimed compensation of Rs. 15 lakhs, as damage. She approached the doctor for termination of pregnancy. The Hospital

Check Your Progress

3. Explain the scope of Medical Negiligence.

Doctor found that it is a case of cervical pregnancy extending to a lower segment of her uterus, which is very complicated, and same type of pregnancy which cannot be diagnosed by clinical or vaginal examination particularly in the early weeks of pregnancy. That Hysterectomy is a recommended and established procedure and on the basis hospital Doctor removed her uterus. When Vinitha claimed compensation it was held accepted practice among medical body, has been done and there was no negligence and Hospital was not liable to compensate any loss.

- 'Negligence' in Highways

Users of The Highway' Two classes of case may be considered under this heading:

1. Duty of one road user to another.

2. Duty by users of highway to persons or property not on the highway.

Regarding the **first category** it may be stated that a very high standard of care is expected of highway users and there are certain special rules. The appropriate standard on conduct is prescribed by the legislature as for example, under the Motor Vehicles Act and rules framed there under. Instead of being left to be prescribed by judges through decisions in cases. Failure to observe the provisions to such acts may be relied upon as evidence of negligence.

To leave a motor car in such a position, e.g., on a steep slope that it could start by itself or be started by child meddling with it, has been held to constitute negligence. To leave a vehicle unattended at night without lights on a dark raises presumption of negligence.

The degree of care required varies according to each situation, facts which may lead to an inference of negligence is one situation may not lead to that inference in another situation.

In Champlal Jain Vs. B.P. Venkatraman **(A.I.R. 1966 Mad. 446)** a pedestrian crossing a road was knocked down by a taxi, which was being driven

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at a speed of 20 miles per hour. That speed was considered to be excessive in a thoroughfare and the defendant was held liable.

Proof of negligence : *"Res ipsa loquitur".* As a general rule, it is for the person alleging to prove specific acts or omissions on the part of the other party which will amount to negligence conduct. Sometimes evidence to prove such negligence conduct may not be forthcoming. It is possible however, in certain cases for the injured party (plaintiff) to rely on the mere fact that something happened as leading to an inference of negligence on the other's part. This presumption of negligence is expressed by the Latin maxim *Res ipsa loquitur* which means "the things speaks for itself".

The classic statement enunciating the principle underlying the above maxim is that of **Erle, C.J. in Scott Vs. London & St. Kaetherine Docks (1865)**. The facts of the case were the plaintiff a customs officer was lawfully passing the door way of the defendant's warehouse. Six bags of sugar fell on him while so passing and he was injured. The defendants were held liable on the basis of the doctrine of res ipsa loquitur, was observed. There must be reasonable evidence of negligence, but where the thing is shown to be under the management of defendant or his servants, and the accident is such as in the ordinary course of things does not happen, if the management use proper care. It affords reasonable evidence in the absence of explanation by the defendants that the accident arose forwant of care. In cases where this doctrine is invoked the plaintiff merely proves a result, not any particular act or omission producing the result and wants it to be inferred that the result was more probably caused by the negligence of the defendant.

It is to be noted that the essential requisites for the application of the doctrine are :-

1. The things which cause the harm must be under the control of the defendant or of some one for whom he is Responsible or over whom he has a right of control.

2. The occurrence is such that it would not have happened without negligence.

In ***Byrne Vs. Bodle (1863)*** a barrel of flour rolled out of an open doorway of the defendant's warehouse and fell on the plaintiff, a passer by in the street below. Held that this occurrence was sufficient prime facie evidence of negligence.

But supposing a hammer falls out of the window even if due to negligence or mischief yet it cannot be a case Res Ipsa loquitor because it is not unusual for small things to fall out.

In ***Municipal of Corporation Delhi Vs. Subhagwanti (A.I.R.1906)*** due to the collapse of the clock tower situated opposite the Town Hall in Delhi, a number of persons died. The clock tower belonged to the Municipal Corporation of Delhi, and was exclusively under its control. It was 80 years old and normal life of the structure of that building could be 40 to 45 years having regard to the kind of mortar used. In these circumstances, the Supreme Court held, that this doctrine applied and inference of negligence followed.

This maxim has been applied in cases of accident on a high way where an unlit vehicle was left on a dark road, as prime facie evidence of negligence of the person responsible for the vehicle or where a car ran on to the pavement and hit a pedestrian in the back.

In the case if **Achutrao Haribhanu and other Vs. State of Maharastra and others (AIR 1996 S.C. 2377)**, the proof and the maxim Res Ipsa loquitor was applied in medical negligence. In this case, one Chandrikabai went to Hospital for delivery and on 10-7-1963 she delivered a child. The lady wanted to undergo sterilization and on 13-7-1963 sterilization was done, but on 15-7-1963 she started feeling pain and on 19-7-1963, again on the advice of Dr. Diwan, the operation was reopened and found mop (Towel) was put and stitched. There was pus formation and the lady also died. It was held, the maxim Res Ipsa loquitor applied and Government was held liable for damages.

4.6. DEFENCES

As has been pointed out in an earlier lesson volenti nonfit injuria will be a defence to an action for negligence also.

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Three defences can be raised in an action for negligence. They are: (1) Vis Major, 2) Inevitable accident; and (3) Contributory negligence.

(1) Vis Major : As we have already seen in earlier lesson vis major or act of God are situation so violent, direct or sudden, that any amount of human foresight could not have foreseen them, or if foreseen, could not be resisted by human skill and ingenuity. Extraordinary storms, high tides Tsunami etc., are instances of viz major. *In Nichols V. Marshland* the defendant had built a series of artificial lakes on his land by damming a natural stream with all due care and diligence in their construction and maintenance. Due to unprecedented rain some of the lakes breached and in the consequent flood carried away four county bridges. This was held to be a vis major.

2) Inevitable accident: Supposing **A** lies drunk in the middle of the road and **B** driving the car with all caution due to dust storm does not see **A** and runs over him and injures him. **A** cannot succeed, it being a case of inevitable of misfortune.

4.7. CONTRIBUTORY NEGLIENCE

Third line of defence for this tort is the plea of "Contributory Negligence". When the plaintiff by his own want of care contributes to the damage caused by the negligence of wrongful conduct of the defendant he is guilty of contributory negligence. In other words, the result of damage to the plaintiff is due in part to his own fault and in part to the defendant's fault.

Butterfield Vs. Forrester, The defendant particularly obstructed the highway by putting a pole across it. The plaintiff riding violently at dust, did not notice the pole and run into it and suffered injuries, but would have seen it had used ordinary care. It was held that the plaintiff failed despite the wrongful act of obstruction by the defendant. **Lord Ellenborough** observed "one person being in default will not dispense with another's using ordinary care for himself."

Check Your Progress

4. Write Short notes on Vis Major.

In ***Lynch Vs. Nurdin*** **(1941) 1 Q.C.29,** the defendant negligently left his horse and cart unattended in the street. The plaintiff aged 7 climbed into it while another boy made the horse move on which caused the plaintiff to fall out and suffer injuries. It was held that the defendant was liable.

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The doctrine of alternative danger: In alternative danger cases the plea of contributory negligence is not applicable. Where the defendant's negligence has put the plaintiff in dilemma and has placed the plaintiff in a situation of peril the defendant cannot escape liability. If the plaintiff to save his person or property, chooses a course of conduct which proves to be the wrong one and suffers injury thereby.

In **Jonce Vs. Boyce (1816),** the plaintiff was a passenger on the top of the defendant's coach. Owing to the snapping of a defective coupling rein the coach was in danger of being overturned. Seeing this the plaintiff jumped from it and broke his leg. In fact the coach was not upset. It was held that although the plaintiff had selected the more perilous of the two alternative before him he was entitled to recover damages.

The basis of the plea of contributory negligence: 1) Public policy that is, to create a spirit among persons to be little more careful of themselves. 2) Pēnal theory to punish a person for not having been careful of his own. This is based on **in pari delicto portior est conditio defendantis** (Davis V.Mann) 3) Principle of joint tortfesasors, that is both the plaintiff and the defendant must be termed to be joint tortfeasors and as such neither party should be allowed to win over the other or to recover. 4) The plea of contributory negligence. But the correct basis of this plea is that of causation, that is whose is the ultimate or decisive cause of the accident for the purpose of fixing of liability.

This rule worked hardship for the plaintiff since, theoretically, even a slight negligence or want of care on his part, barred the plaintiff from all recovery through the defendant's fault was the main cause of damage to the plaintiff. The courts, therefore, modified the law by introducing the rule which came to be known as the last opportunity rules. It permitted full recovery to plaintiff not withstanding his own negligence, if the defendant had the last opportunity of avoiding the accident but negligently failed to avail himself of it. In other words, when two persons are negligent, one of them who had the later opportunity to avoid the – accident by ordinary care is liable for the less. Consequently, if the defendant is negligent and the plaintiff having a later opportunity to avoid the consequences of the negligence of the defendant does not observe ordinary care, he cannot make the defendant liable for that.

Check Your Progress

5. Write a on Contributory Negligence.

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The case of ***Davis Vs. Mann (1834)*** explains this rule. In this case the plaintiff negligently left his donkey with its legs tied, in the highway. The defendant was driving his wagon too fast that he dashed against the animal and killed it. It was held that the defendant was liable and that plaintiff, in spite of his own negligence was entitled to recover damage .

Contributory negligence of children : The plea of contributory negligence will not to be applicable against children. The conduct of child in bringing about its own injury may not be conscious act of volition. Therefore, the defence of contributory negligence will be more difficult to establish against a child than against an adult. What is negligence in a grow-up person is not necessarily negligence in a child. the age of the child is a circumstance to be considered in deciding whether he has been guilty of contributory negligence. In **Yachuk V.Oliver Blais (1949)** a boy, Y aged 9 years bought from a petrol station some gasoline (a highly inflammable liquid) falsely stating that his mother wanted it for her. In fact, he used it to play with and in doing so, was badly injured by it. It was held by the Privy Council that the petrol station was negligent in supplying gasoline to so young boy and that the boy Y had not been guilty of contributory

4.8. SUMMARY

The law of Torts is mainly governed by Rule of Negligence. In this unit the scope of Negligence is discussed elaborately with important case laws of England and India. Negligence is accepted as a distinct and independent tort only after the first quater of the nineteenth century. Specifically we noted the – Medical Negligence with reference to case law **Vinitha Ashok vs. Lakshmi Hospital** and others.

4.9. ANSWER TO CHECK YOUR PROGRESS

1. Refer 4.2
2. Refer 4.4
3. Refer 4.5

4. Refer 4.6

7. Refer 4.7

4.10. KEYWORDS

Yacht	-	a light vessel esp. for racing
County	-	The biggest unit of a local government in Britan.
Foresight	-	The Power to see the future in advance
Anaestetic	-	Substance that produces anaesthesia

4.11. MODEL QUESTIONS

1. What is Negligence? What are the essentials of Negligence?
2. Discuss the doctrine of Contributory Negligence and their exceptions.
3. Write a short Notes on :

   (a) The Doctrine of Alternative danger.

   (b) Medical Negligence and doctors' liability.

UNIT – 5

SPECIFIC TORTS - I – INJURIES TO PERSON

INTRODUCTION

"Categories of tort are never closed" – Dr. Winfield. Having discussed the general principles underlying the law of tort, it would now be appropriate to deal with various specific torts. Different authors have classified torts according to their own conceptual perceptions because a scientific, classification of tort which may be universally acceptable appears to be rather impossible. Professor Ramaswamy Iyer has preferred a five-fold classification of torts under the following sub-heads :-

(i) Torts affecting person

(ii) Torts affecting property

(iii) Torts affecting Estate

(iv) Torts affecting Reputation

(v) Torts relating to abuse of Legal Remedies.

In this unit we are going to discuss the torts in relating to persons. Torts relating to person include (a) assault (b) battery (c) false imprisonment (d) domestic violence (e) deceit (f) nervous shock – etc.,

UNIT OBJECTIVES

- To briefly discuss about the various kinds of specific Torts.
- To understand the torts against person (or) Human body.
- To analyse the difference between Assault and battery.
- To know the tort of 'Nervous shock'.
- To study the wrongs to Family Relationship and tort against and born child.

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UNIT STRUCTURE

5.1. Classification of specific torts

5.2. Assault and Battery

5.3. False Imprisonment

5.4. Nervous shock

5.5. Torts affecting domestic Relations

5.6. Torts Relating to parental Rights

5.7. Summary

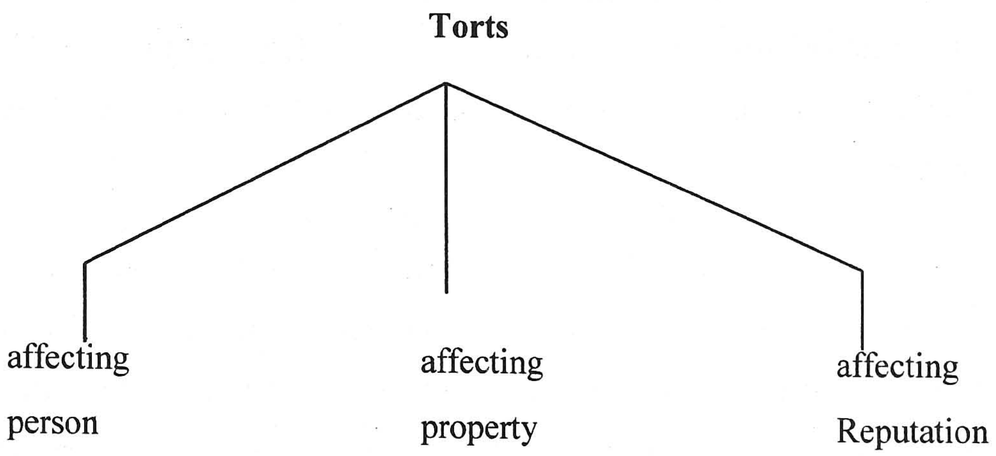
5.8. Answer to Check you progress

5.9. Key words

5.10. Model questions

5.1. CLASSIFICATION OF SPECIFIC TORTS

The categories of classification are never closed. Our classification of torts must be academic and should be guided by the idea of importance.



i.e. Assault and Battery	i.e. Land Trespass	i.e. Libel and slander
Mayhem	Conversion	Malicious prosecution
False imprisonment		abuse of legal process

Winfield, following his definition of tortuous liability, classified the different kinds of torts, on the basis of the liability of the wrongdoer. Foremost among such classified torts is intentional trespass or wrong to the person, since

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the security of a man's person, was considered the most elementary and important among civil Rights and one that had been protected by law, from the early stages of its development. There are four kinds of wrongs to the person namely : 1. assault 2. battery 3. bodily harm 4. false imprisonment.

5.2. ASSAULT AND BATTERY

Assault: Assault is an attempt or threat to commit a battery or in other word's an assault is the unlawful laying of hands on another, or an attempt to do a corporal hurt to another coupled with present ability and intention to do the act". If the threat is actually carried out, the whole incident is properly described as an assault and battery. Thus where defendant by his act created an apprehension in the mind of the plaintiff that he is going to commit a battery against him, the tort of assault is committed. Mere words are not enough: nor any gesture or other action which do not cause reasonable apprehension of use of force will constitute a assault.

If a person moves in a manner threatening to use force he commits assault. In **Martin Vs. Shoppe. (1828)** the defendant pursued the plaintiff with uplifted whip intending to strike him, but the latter escaped and it was held an assault. In **Tubewell Vs. Savage** the defendant put his hand to his sword and said. "If it were not assize time. I would not take such language from you". It was held to be not assault as it could not create any apprehension of use of force by the defendant.

The intention of the offender is important. But there need not be an actual intention or power to use violence; it is enough if the plaintiff reasonably apprehends the danger. Thus A can maintain an action against B. If B threateningly points a gun at A eventhough B knows (but A does not) that the gun is not loaded. In **Stephens. Vs. Myres, (1830)** the plaintiff was chairman at a meeting. The defendant being vociferous by a majority it was decided to turn him out. Upon this the defendant said he would rather pull the chairman out of the chair than be turned out of the room, and immediately advanced towards the plaintiff with clenched fist. He was stopped before he could reach the chairman. The witnesses said that it seemed to them that defendant was advancing with the

Check Your Progress

1. What is Assault?

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intention to strike the chairman. The Jury fined the defendant one shilling damages.

Tindal C.J. said in the case. "It is not every threat, when there is no actual personal violence that constitutes an assault; the there must in all cases, by the means of carrying the threat into effect...........if he was so advancing that, within a second or two of time, he would have reached the plaintiff, it seems to me it is an assault in law."

You must also note that assault is a criminal offence, and punishable as such under section 351 of the Indian Penal Code.

BATTERY: Any direct intentional application of force to the person of . another individual without his consent or lawful justification constitutes the wrong of battery. Battery like assault in trespass is actionable perse i.e., without proof of damage.

In **R Vs. Ireland (1998),** the House of Lords ruled that someone can commit the tort of assault through mere silence. The defendant in that case made a series of malicious telephone calls to three-women when they answered he would remain silent. The women all developed psychiatric illnesses as a result of their treatment at the hands of the defendant. The defendant was charged with committing the offence of assault occasioning actual bodily harm and was convicted. The House of Lords upheld the conviction, holding that his silent telephone calls could have led the women in question to believe they were about to be attacked by whoever was on the other end of the line.

Even though the force used is very trivial and does not cause any harm, the wrong is committed. Thus, even to touch on a person in anger or without any lawful justification is battery. Anything that can be called a below, whether inflicted with hand, weapon or any other mechanism is a battery. Throwing water upon a person, spitting on his face, pulling a chair from under him as he is in the act of sitting down whereby he falls to the ground and letting a dog on another examples of battery. In **P.Kader vs. K.A. Allagarswami** (A.I.R. 1965 Mad 438) a police officer, who put handcuffs to an under trial prisoner and chained him like a dangerous animal to a neighbouring window in a hospital, during his medical treatment was held liable for trespass to person.

Check Your Progress

2. Explain Battery.

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There is however no battery unless there is an act by the defendant. Mere passive obstruction is not use of force. In **Inns vs. Wylie (1844)** a policeman unlawfully prevented the plaintiff from entering the club premises. He did not touch or threaten the plaintiff but only obstructed entrance to a room by standing still. It was held that "as the policeman was entirely like a door or a wall put to prevent the plaintiff entering the room", there was no battery or assault. Again no battery is committed, if there is an incident over which the defendant had no control, e.g. he is not liable where a frightened horse runs away with him and collides with the plaintiff. If the use of force is not intentional, e.g. jolting one, another in a crowd, there is no battery.

Assault and Battery distinguished : In both, motion is necessary, but while the application of unlawful force to another constitutes the wrong called battery, an action which puts another in instant fear of unlawful force, though no force be actually applied is the wrong called assault. "So physical contact is necessary in battery, but in assault mere fear of physical violence is enough. So assault is inchoate battery".

Defences to an action for assault and battery: Assault and battery may be justified in the following cases:

1. Self-defence : Reasonable force used to protect one's own person or property is justified in self defence. This has been technically termed as son assault demesne which literally means that the act complained was the result of plaintiffs own aggression or attack. The term 'self-defence' should not be confined to its liberal meaning to denote defence of own-self; but it extends to protection of wife, children, parents, servants etc., It extends to both, protection of person as well as the property.

2. Defence of one's property: The owner of premises and goods is justified in ejecting a man who enters those premises with force or violence.

3. To prevent a forcible entry or seizure of chattels: The rightful owner or his servant under authority may be necessary force retake possession from one who has wrongfully taken possession of them.

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4. In exercise of parental or quasi-parental authority. Light force used for chastisement or correction of child, pupil apprentice. But a husband has no corresponding power over his wife.

5. Leave and Licence: Where a man exposes himself with knowledge and of his own free will, he cannot complain e.g., in boxing, football, wrestling etc.

6. Preservation of public peace: A person disturbing a public meeting or religious worship may be removed by using reasonable force.

7. Legal process: For serving legal process, including search under any law.

8. Misadventure: Inevitable accident is a good defence for a trespass to person if act is lawful and done with care, not if the act is unlawful or done negligently. Ref case **Timothy Vs. Simson (1885).**

MAYHEM

After death, mayhem is the most serous personal injury, it is to-day called, 'maim'. It has been held that loss of teeth, hand, legs, finger, or even castrating would give rise to an action for mayhem while the cutting of the ears or nose would amount to disfigurement and would be only battery.

It must be noted that in all the three cases of assault, battery and mayhem action will be without proof of actual damage as it violates the right of person. They are criminal as well. The victim can sue as well as prosecute the defendant.

5.3. FALSE IMPRISONMENT

This is the infliction of bodily restraint, without lawful justification. Both the terms "false" and imprisonment" used to denote this tort are apt to mislead, "false" does not signify "fallacious" but is used in the less common sense of "erroneous or "wrong", So also imprisonment" may occur without there being any physical contact with or anything resembling a person to confine the person wronged. "Imprisonment is no other thing but the restraint of a man's liberty, whether it be in the open field in the stocks or in the cage or in the streets or in a man's own house, as well as in the common goal and in all the places the party so

Check Your Progress

3. What is Mayhem?

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restrained is said to be a prisoner so long as he has not his liberty freely to go at all times to all places wither he will". What happens in false imprisonment is that person is confined within certain limits so that he cannot move about and so his personal liberty is infringed.

The restraint must be total and without lawful justification There must be restriction of movement in all directions. A mere restraint or obstruction of movement in one direction does not constitute the tort of false in imprisonment. However, it is an offence under section 339 of the Indian Penal Code.

In **Bird Vs. Jones (1845)** the defendants wrongfully enclosed part of the public path-way on a bridge, put seats in it for the use of spectators for a regatta on the river and charged for admission to the enclosure. The plaintiff insisted on passing along this part of the footpath, and climbed over the fence and got into the enclosure without paying the charge. The defendants refused to let him go forward but he was told that he might go back into the carriage way and cross to the other side of the bridge, if he so desired. He refused and remained in the enclosure for half an hour. In an action brought by the plaintiff against the defendants claiming damages for false imprisonment. The defendants were held not liable.

There has been a difference of opinion on the point whether knowledge of the plaintiff that there has been a restraint on his freedom, is essential to constitute the wrong of false imprisonment.

Defences – Lawful detention: When there is some justification for detaining a person there is no false imprisonment. Thus if a man entered certain premises agreeing to certain reasonable conditions it is no wrong to prevent him from leaving the premises until and unless such condition are fulfilled. In **Herd' vs. Weardale, Steel Coke and Coal Co., (1915)** a minor, in breach of his contract of employment with defendants refused wrongfully to do certain work allotted to him in the mine, and demanded to be taken to surface by the lift, five hours before his shift expired. He was not allowed to leave for twenty minutes. In an action for false imprisonment the defendants were held not liable. In **Maharani of Nabha Vs. Province of Madras (1942)** a Sub-Inspector of Police misunderstanding a message sent to him, prevented the Maharani of Nabha for

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boarding a train and also posted two policeman to prevent her car from being taken out of the railway compound. Here it was held that there was no false imprisonment because the Maharani was not restrained or confined only her liberty to go in the conveyance was restricted. It must be noted that it is not necessary to prove that there is an actual physical restraint, all that is necessary is that where a man threatens or declares his intention of arresting another with a show of authority to which the other submit, there is imprisonment. Thus in **Merrying Vs.Graham etc., (1919)** the plaintiff being suspected of theft, was asked by two aviation officers to accompany them to the defendant's office and there he was kept under guard. The defendant company was held liable for false imprisonment.

Defendant acting in support of the law: Sometimes an imprisonment may be justified on the ground that the defendant was acting in support of the law. In India the power of arrest is vested in the police officers for maintenance of law and apprehension of offenders of law and persons suspected of having committed serious offences. Such powers of arrest are exercisable under certain circumstances, by private persons also. Section 403 of the Code of the Criminal Procedure, 1973 empowers a private person to arrest any person "Who in his presence commits a non-bailable or cognizable offence, or any proclaimed offenders". Special statutes passed for various purposes, confer powers of arrest and imprisonment on certain officers in the discharge of their duties and regulate the exercise of such powers. For example, the lunacy Act, Maintenance of Internal Security Act 1971, empower certain officers to arrest and detain persons, under the provisions of these acts. The officers who exercise such powers are protected from any suit or other-legal proceeding by virtue of immunity granted under these Acts.

Remedies : There are three remedies for a person subjected to false imprisonment. They are 1. Action for damages 2. Self-help and 3.Habeas Corpus.

Action for damages: Whenever the plaintiff has been wrongfully detained he can always bring an action for recovery of damages. The compensation claimable can include not only claim for injury to the liberty but also for disgrace and humiliation caused by the false imprisonment.

Check Your Progress

4. What are the remedies available for false imprisonment?

(Space for Hints)

Self-help: No one who is unlawfully restrained need wait until he is released by a legal action. He can use self-help in order to escape and for this purpose he is authorized to use reasonable force.

Habeas Corpus: In case of false imprisonment there is a remedy by way of an application for a writ of habeas corpus for ending the imprisonment. Such a writ may be issued either by the Supreme Court under Article 32 or by a High Court under Article 226 of the Constitution. The application would be against the State or one of its officers exercising public authority in disregard of the above provisions. If the court finds that the detention is without any just or reasonable ground it will order that the person detained should be immediately released. It may be noted that the right of individual freedom and the exercise of courts jurisdiction to issue writ of habeas corpus has been very much restricted both in England and India, during war time and by the promulgation of various Emergency Act.

5.4. NERVOUS SHOCK

This type of bodily harm though comparatively a rare occurrence deserves special consideration. The liability arising for nervous shock and bodily illness or disorder following it, though the shock was caused not by the application of physical force to the body of the sufferer; but by words or acts calculated to cause emotional disturbance like fear, sorrow or distress to him was formerly uncertain. The view that the law takes congnizance only of physical injury resulting from actual impact was considered crude and has been discarded in later development of the law on this aspect.

In **Hambrook Vs. Stokes (1652)** the defendant negligently, left the lorry unattended with the engines running at the top of a step narrow street. The lorry started by itself and ran violently down the hill where the plaintiff left children. She was terrified and later some one said a child had been injured. In consequence of her fright and anxiety fell sick and she died. Her husband claimed damages for nervous shock and mental pain, and it was awarded.

Check Your Progress

5. Explain Nervous Shock.

Bourhill Vs. Young: 1943, A motor cyclist passed a tramcar and stopped. In the stopping ran into a motor car, crossed in front of the tramcar. The noise

caused by the collision resulted in nervous shock to a fish woman standing in the street. Held that the wrong doer owed no duty to the plaintiff. But in this case the House of Lords recognized nervous shock as a specific tort although no compensation was granted. The Madras High Court in **Halinga Vs. Mohana Sundram, (1961)** granted compensation for nervous shock.

There is no doubt that mere shock or fear alone is not actionable. Mental suffering alone is not enough. There must be some outward and physical result of that emotion, e.g. illness resulting from nervous shock. This is illustrated by the facts of the case reported in **Wilkison Vs. Downton (1897)** where A, by way of practical joke, falsely told the plaintiff, a married woman, that her husband had met with a serious accident resulting in both his legs being broken and was lying serious accident resulting in both his legs being broken and was lying in hospital. She believed this and was so violently upset, as a consequence of fear and anxiety created by the news and became seriously ill. A was held liable to pay damage for the serious illness from which she suffered and for expenses for going to the hospital. The defendant A was held liable because he had willfully done an act calculated to cause harm to her, that is to say. To infringe her legal right to personal safety and had thereby caused physical harm to her.

This case was approved in **Janvier Vs. Sweeney (1919)** where the defendant, a detective, told the plaintiff falsely that her betrothed was a German spy, thereby causing nervous shock and illness to her. The defendant told this false news with a view to obtain inspection of certain letters with her. It was held that the defendant was liable for damages.

Nervous shock caused by the apprehension or actual sight or sound, immediate physical injury to a relative or friend may also give rise to an action for damages. In **Dulieu Vs. White, (1901)** the defendant's servant negligently drove a pair-horse van in to the front of public house belonging to the plaintiff's husband while she was standing behind the bar. The fright and shock thereby caused to her, who was then pregnant, resulted in a miscarriage and illness. It was held that she could recover damages for harm due to nervous shock.

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5.5. TORTS AFFECTING DOMESTIC RELATIONS

In the early state of society, it was recognized that men had certain proprietary rights in his wife, children and his servants. The parent had a right to the service of the child and the husband to the consortium of his wife. This idea formed the basis of actions permitted against those who interfered with a man's wife or child on the ground that such interference was of his proprietary rights. This in turn led to the development of a number of tortious remedies for enticement of a spouse and loss of service of his child.

The actions for enticement of wife or a husband and loss of service of the child to a parent were considered to be outmoded and unsuitable to modern social concepts and conditions. In consequence, all the remedies mentioned above, except that for loss of consortium, have been abolished in England, by the Law Reform (Miscellaneous Provisions) Act, 1970. Section 5 of the Act provides that no person is liable in tort: (a) to another person on the ground of having induced (or enticed) the wife or husband of that other to leave or remain apart from that other, (b) to another person for harbouring the wife or child of that person.

So according to the present law, where the husband is deprived of his wife's consortium or, society or services by any physical harm done to her or by an imprisonment, the husband's claim damage for the fault of the wrong doer. The husband's claim in this respect is quite distinct from that of the wife in respect of her own injuries. Proposals have been made recently for the abolition of the husband's action for loss of consortium. But such proposals are under consideration.

In India cases applying the English rule in this regard are very rare. As the law relating to injuries to domestic relationship had been criticized even in England and had been consequently changed in many respects by the Law Reform (Miscellaneous Provisions) Act, 1970, the Indian courts may not adopt the old English law in this regard. On principles of justice equity, and good conscience, the Indian courts may well adopt principles, which protect the family tie and honour as such.

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Where the injuries result in the death of the wife, the husband can under the Fatal Accidents Act claim compensation. That right of action being founded on loss of society and services it follows that where the wife was before her death living separately from the husband he will not be entitled for damages.

5.6. TORTS RELATING TO PARENTAL RIGHTS:

The right of the parent to the custody, control and services of the children is not vested in the capacity of parent but in the capacity, as the employer of the child. A person in loco parentis has a similar right. Proof of living under the parent's roof is sufficient evidence of service.

For seduction of a female servant the employer and of a female child, the father or guardian has a right of action for seduction. For action two things are necessary, firstly, proof of actual service of some kind, however slight, at the date of seduction and secondly, the victim must have been rendered ill and incapable of rendering service in consequence of the seduction. Where a parents is concerned, the action is based on a bare fiction of service, but loss of service must be alleged and proved. In **Terry Vs. Hitchinson. (1836),** it was held, that the plaintiff could maintain an action for seduction of his daughter under twenty one years who was seduced in a railway train while on her way home from employment. But where a daughter is in full time employment under another employer and renders minor service to the father, then the father has no cause of action. If the daughter is a major, then the father must prove some actual service, though the acts of service rendered may be slight. Even making tea has been found to be sufficient. *In* **Beetham Vs. James (1937)** here the girl was twenty two years old and was working in the day time elsewhere, but at nights she used to help her mother and the plaintiff who though not married were living together for a number of years. Court held that plaintiff was standing in loco parentis and could recover in an action for seduction.

A married woman separated from her husband and acting as servant to her father can have a right of a action if she is seduced. A woman can have no action in respect of her own seduction as the action is based on the relationship of master and servant. So also in the lifetime of the husband the wife can have no right of action where daughter's seduction is concerned.

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5.7. SUMMARY

Bodily harm can be conveniently divided in two separate categories,

(i) Trespass or intentional injuries – i.e. Battery, Assault.

(ii) Non trespassory injury – i.e. Nervous stock.

We discussed about the above said two type of injuries elaborately. The recent case-law **Gogula Krishnan Vs. State of Tamilnadu (2009)** the Supreme Court awarded exemplanary compensation to the victim for false imprisonment. The Domestic violence (prevention) Act 2005 gives more protection to the women from Domestic violence (or) wrongs relating to family relationship.

5.8. ANSWER TO CHECK YOUR PROGRESS

1. Refer 5.2
2. Refer 5.2
3. Refer 5.2
4. Refer 5.3
5. Refer 5.4

5.9. KEYWORDS

Seduction	-	act of seducing
Consortium	-	association of family members
Lunacy	-	madness
Misadventure	-	Misfortune

5.10. MODEL QUESTIONS

1. What is the Nervous shock. Do you agree it is a specific tort against the human body – discuss.
2. Briefly state the essentials of the Assault and battery.
3. Examine the person's liberty and tort of wrongful restraint.
4. Explain the wrongs relating to Family relationship.

UNIT – 6

SPECIFIC TORTS – WRONGS TO PROPERTY

INTRODUCTION

In this unit, we will discuss about the wrongs relating to the property i.e. – Nuisance, trespass to the land and goods. Thereafter, we are going to analyse the development of strict liability and absolute liability and its application in Indian Law. The other important topic we are going explain relates to liability for animals and liability for keeping dangerous structures in the premises.

UNIT OBJECTIVES

- To understand the wrongs related to the property.
- To study about the Nuisance.
- To discuss the strict liability and absolute liability.
- To analyse the Scope of the tort relating to Trespass to goods.
- To study the tortious liability of holders to animals and dangerous substances.

UNIT STRUCTURE

6.1. Trespass to land

6.2. Trespass to goods

6.3. Nuisance

6.4. Strict liability – absolute liability

6.5. Liability for animals

6.6. Liability for land and dangerous structures of premises

6.7. Summary

6.8. Answer to Check you progress

6.9. Key words

6.10. Model questions

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6.1. TRESPASS TO LAND

Trespass : The wrong of trespass is committed by the act of intentionally of negligently entering or remaining on or directly causing any physical matter to come into contact with land in the possession of another. Thus trespass to land means interference with the possession of land without lawful justification.

The commonest from of trespass consists in a person himself entering the land or building of another person or doing the same by some other person at his instance, the slightest crossing of the boundary is sufficient to make the act a trespass.

In trespass, the interference with the possession of land must be direct if the interference is indirect and consequential, it may be nuisance but not trespass. For example, if a person unauthorisedly walks upon his neighbour's land or goes into his building, it is trespass. Equally so, if he throws things on the neighbour's land or allows his cattle to stray on to it from his land. Similarly, if you throw stones on your neighbours premises you commit the tort of trespass: but if you allow stones from a ruinous chimney to fall on other's premises it is not trespass but nuisance. Again, if plant a tree on your land, it is trespass. But if the roots or branches of a tree of my land project into your land it is nuisance. A person may commit trespass either personally entering the land of another or doing the same through some material object, i.e. throwing rubbish on another person's land driving nails into the walls, placing of ladder against the wall or leaving debris on the neighbour's roof.

Trespass to land may be committed firstly, by wrongful entry; putting a hand through a window or sitting on the fence of another will be trespass, secondly, by remaining on the land unlawfully having entered lawfully; and thirdly by placing things on the land.

Trespass being a wrong against possession rather than ownership, a person in actual possession can bring an action for trespass. The owner of land who neither has possession nor any immediate right to possess it cannot sue for trespass. Trespass is actionable perse ie., whether or not the plaintiff has actually suffered any damage.

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Trespass ab initio: If one who is entitled by law to do an act abuses his authority to do it, he is said to be trespsser ab initio his act being reckoned as unlawful from the very beginning however innocent his conduct may have been up to the moment of his abuse. Thus, the law allows anyone to enter a hotel for refreshment and a constable to search a person suspected of having stolen goods, but if the guest steals the property at hotel or, if the constable used unnecessary violence in his search the act is deemed unlawful as if the entry or search had never been authorized at all. But the abuse must be positive act and not a mere omission. Trespass is doing something positive; not doing something is not trespass. In **Six Carpenter's case** reported in (1610) Six carpenters entered the plaintiff's Bar, asked for wine and drink but refused to pay for that it was held that the refusal to pay would not make them trespassers. If on the other hand they had stolen or carried away some article from the Bar they would have been regarded as trespassers from the moment of entry because the law presumes from the subsequent act the original entry itself was with an unlawful intent.

Defences: An entry by a person upon the land in the possession of another is not a trespass if it is justifiable as act:

1) authorized by law; 2) by consent of that other person his predecessors in title.

Licence to enter given by law: In certain cases law permits entry against the consent of the person in possession. Such entry authorized by law is known as justification by law. The person against whom an action for trespass is laid can plead that he did what he was permitted to do under law. For example, a policeman commits to trespass if he enters as a police into the house through an open door, late at night to enquire into a disturbance in the premises. So also a process server who enters private-premise to serve any court process does not commit any trespass by entering the building of the debtor. Any other officer of law who is empowered under statute to enter private properties in discharge of his duties will not be liable in trespass. Nor is it only officers of the law who may be thus empowered. A private person may in certain circumstances arrest criminal and he commits no trespass if he breaks into the house of another person to prevent him from murdering his wife or from committing other serious offences.

Check Your Progress

1. What is Trespass ab initio?

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A person may justify trespassing on the plaintiffs land in the following circumstances 1. Entry for recapturing his goods 2. Re-entry by the owner. 3. For abatement of nuisance.

1. Entry for recapturing his goods :

A person may justify his entry on the plaintiffs land to recover his goods when they have been taken and put them by the wrongful act of the plaintiff himself he cannot, however, do so. If the plaintiff whose possession of the goods was originally lawful, detained them wrongfully, e.g., where a bailee refuses to deliver the goods to the bailor after the bailment has come to an end. Similarly, where goods had been placed there in pursuance of the criminal act of a third person or they got there buy an accident, e.g. Act of God, he can retake the goods by entering that place.

2. Re-entry by the owner

An owner can re-enter on his land peaceably, having put an end to the right of the person in possession of the land to continue his possession. It has been held in England that the owner who uses the necessary force to re-enter cannot be used for damages of trespass.

The law-confers a right on occupier of land to enter upon another's building for abating a nuisance upon it, e.g. removing the filth on it but he must previously give notice of his intended entry to abate the nuisance unless the case is one of emergency. The entry on and for this purpose cannot in any case be made by force.

A Licence who exceeds his licence is a trespasser. Thus if a person who is allowed to sit in a drawing room, enters the bedroom without any justification, the entry into the bed room is a trespass. Licence granted is either bare licence i.e. one granted otherwise than for valuable consideration or a licence coupled with a grant. In the former case the licence can be revoked by the licensor. A simple instance of this rule is an invitation or permission by the occupier to another to enter or use his land or house without any consideration for it. If he revokes the licence the licencee who remains thereafter is a trespasser. An instance of licence coupled with a grant is the transfer of a right to cut trees and take them.

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This licence involves necessary right to go on the land to cut the tree and remove them. A licence coupled with a grant cannot be revoked during the period when the licence is to be operative.

In ***Hur .Vs. Picture Traders LTD. (1915)*** the plaintiff has purchased a ticket for a seat at a cinema show at the defendant's theatre. He was wrongly suspected of having entered without a ticket and was asked by the management to leave the hall. On his refusal to leave he was forcibly removed from the picture hall. He sued the management for assault and false imprisonment. The licence to the plaintiff in this case was considered to be with grant and it was held that the same could not be revoked. The revocation being invalid his forcible removal from the picture hall was held to be an assault, for which he was entitled to recover damages.

Remedies: The remedies, may be extra-judicial or judicial. The former are three in number. 1. Expulsion of the trespasser. 2. Re-entry 3.Distress damage feasant.

Let us examine each one of these remedies. Reasonable force may be used to eject the trespasser. So also the person who is dispossessed from his property may re-enter if he can do so without force.

The third remedy, **distress damage feasant** means the distraint of things doing damage. The right authorizes a person in possession of land to size trespassing cattle or other things which go on his land and cause damage there. He can detain the things seized and compel the owner of the things to pay compensation for the injury done by it. Though usually this right is exercised over straying cattle it is not confined to them only but extends to all things animate and inanimate. The things seized, therefore, may be a cricket ball, a foot ball, cow, horse or even a railway engine.

Check Your Progress

2. Explain distress damage feasent?

The right or distress can be exercised for all damage consequent on the trespass, whether the injury is to land or to any other thing. Thus, in **Boden Vs. Boscoe (1894)** the occupier of land was held entitled to detain a pony which after trespassing, had kicked his filly, until compensation for the damage done was paid. In **Ellis Vs. Laftus Iron Co**, the defendant's horse injured the plaintiff's

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mare by biting and kicking her through a fence belonging to the defendant. This was trespass and defendant was held liable.

Judicial remedies: the civil remedies available are for 1) recovery of damages 2) recovery of the immovable property and 3) injunction

6.2. TRESPASS TO GOODS

Trespass to goods is a wrongful interference with the possession of them. It consists in direct physical interference with the goods, which are in plaintiff's possession without any lawful justification. It may take innumerable forms such as throwing stones on a cat or removing is tyre from a car or the car itself from a garage shooting birds or animals beating them or infecting them with disease, or chasing animals so as to -make them run away from its owner's possession. It is also trespass to kill a dog by giving it poisoned meat.

Trespass to good is actionable Per se that is without proof of any damage. However, when the plaintiff had suffered no loss he will get only nominal damages.

A trespass is the interference with possessions. The plaintiff could not sue unless he establishes that he had possession of the goods at the time of the interference. A person may have either direct physical possession of the goods or he may have their constructive possession, e.g. an owner of goods may possess them through his servant or agent a carrier of goods or by some other bailee. A man who had no possession of certain goods may sue for conversion for this action is based on title to goods while trespass is solely based on possession of them.

A person in possession can sue even without any proof of his title to the goods. A trespasser can not take the defence of Justerti i.e., he cannot be allowed to say that some third party and not the possessor of it had good title to the goods.

The wrongs to goods are movable property can be classified as **1) trespass, 2) conversion, 3) physical injury not amounting to trespass.**

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Conversion consists in willfully and without any justification dealing with the goods in such manner that another person, who is entitled to them, is deprived of their use and possession .It may also consists in absolute denial of his right to deal with them even though there may not be any physical interference with their possession. It is important to note that person must have title to the goods before he can complain of conversation of goods but in trespass it is not necessary that the plaintiff must have title to the goods and it is sufficient if he is in possession of them.

*In **Richardson v.Atkinson,*** the defendant drew out some wine out of the plaintiff's cask and mixed water with the remainder to make good the deficiency. He was held liable for the whole cask as he had converted part of the contents by taking them away and destroying the remaining part by mixing water.

*In **Ruplal Vs. Union of India (A.I.R.1972)*** J.K. 22 some military jawans found some firewood lying by the river side. Mistakenly thinking that the wood probably belonged to Government they took away the wood in military jeeps for camp fire and fuel. Ultimately, it turned out that the wood belonged to the plaintiff, in an action against the Union of India for the tort of conversion committed by its servants. It was held that Union of India was liable to compensate the plaintiff for the loss and the fact that the jawans did not intend to commit theft of the firewood did not absolve the State from its liability.

Remedies Extra judicial - retaking or recovery of the goods.

The owner may retake his goods and may also use the necessary amount of force to do so.

Judicial: There can be an action for one or both of the following relief's: 1) Damage for the trespass 2) injunction to prevent a continuing or threatened trespass.

6.3. NUISANCE

Check Your Progress

3. What is Nuisance?

The term nuisance is not susceptible of exact definition. A variety of conditions or activities, which unduly interfere with the use or enjoyment of land is compromised within the definition of nuisance. To express it differently, nuisance is an injury to the right of a person in possession of property to

undisturbed enjoyment of it and it results generally from an improper use by another person of his own property. Acts interfering with the comfort, health or safety of persons in enjoyment of a property are examples of it. The interference may be by water, fire, smoke, smell, fumes, gas, electricity, heat, noise disease producing germs, excavations or any other thing, which causes such an inconvenience.

Winfield has defined nuisance thus : "an unlawful interference with a person's use or enjoyment of lands or of some right over or in connection with it".

Ingredients: (1) unlawful interference with a person's use of land, or (2) enjoyment of land, or (3) enjoyment of some right over and, or (4) in connection with it.

Nuisance and Trespass - Distingused

Nuisance should be distinguished from trespass, which is also a wrong to property. Both are similar in that wrong is done to a person in possession. The two may even overlap when the injury is to possession e.g. Trespass of cattle, discharge of noxious matter into a stream and ultimately on another's land. The points of difference between them are: a) In trespass, there is direct physical interference with the plaintiffs possession of land through some materials or tangible object. In nuisance of land through some materials or tangible object. In nuisance the interference is not direct but consequential. To plant a tree on another's land is trespass but when a person plants a tree in his own property but allows its roots or branches to spread into or over the land of another person, it is nuisance. b) In trespass, interference is through some material tangible object. If the object which causes the interference is not material or tangible, such interference amounts to nuisance. in this way, if interference is vibration, notice, smell, electricity or smoke, the wrong committed is nuisance. c) A trespass is actionable per se, that is even in the absence of any damage done by the act; but in action for nuisance, damages has to be proved.

Public Nuisance and Private Nuisance: Public nuisance is interference with the right of public at large, such interference being by an act or omission to discharge a legal duty which causes any common injury, danger, or annoyance to the public or to the people in general who dwell or occupy property in the

vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right. A public nuisance is a crime and so punishable as an offence under the criminal law. Familiar examples of public nuisance are: brothel keeping, obstructing a highway by digging a trench, or constructing structure on it.

In ***South-port Corporation Vs. Esso Petroleum Co.*** **(1954)** deposit of oil on the foreshore of an estuary was held to be a public nuisance.

Private nuisance, has been defined by Winfield, as "unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it". Usually a private nuisance is caused by a person doing on his own land something which he is lawfully entitled to do. His conduct only becomes a nuisance when the consequences of his acts are not confined to his own land but extends to the land of his neighbour by 1) causing an encroachment on his neighbour's land 2) causing physical damage to his neighbour's land or buildings or works or vegetation upon it, or 3) Unduly interfering with his neighbour in the comfortable and convenient enjoyment of his land.

The basic difference between them are: 1) an action for damages lies in respect of a private nuisance, but not in respect of a public nuisance unless the individual complaining of it proves that he has suffered particular damages beyond that suffered by the rest of the community: 2) while a private nuisance may be abated, a public nuisance cannot be abated except to the extend to which it cause the special or particular damage to the person who desires to abate it. 3) while a private nuisance can become legal by enjoyment for a period specified by law i.e., by prescription, public nuisance cannot be legalized by its continuance for any length of time.

The conditions for maintainability of a suit for public nuisance by a private citizen: To enable a private individual to sue for a public nuisance he must prove:- 1) Special damage, which means he must have suffered a particular injury, beyond that suffered by the rest of the public. Obstruction of a highway, must have caused him some special damage, then alone a suit is maintainable.

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2) Injury must be direct and not merely consequential 3) Injury must be substantial not Negligible.

Remedies For a Public Nuisance: 1) the act, which constituted a public nuisance being an lawful act, is punishable as a crime. 2) A civil action by the Advocate-General or by two or more members of the public with his sanction may be maintained as provided under sec. 91 C.P.C. 3) In cases where a particular, person suffers some special or particular damages different from what is inflicted upon the public as a whole, a civil right of action is available to the person Injured.

For example, if a trench is dug on a public road, it may cause inconvenience to public at large, but no individual can bring a civil action complaining about it. But if a person is injured by falling into the trench, he can sue in tort. Nuisance Relating to highways – One class of public nuisance on which considerable case law has developed relates to high ways. A Highway is a way over which all members of the public have a right to pass and re-pass e.g., a public road, bridge, river or navigable canal.

*In **Rose Vs. Miles,*** **(1815)** the defendant wrongfully moored his barges across a public navigable stream and thereby obstructed it so that the plaintiff who had begun a journey on the creek with his barges, before the obstruction was made, had to unload them and to suffer expenditure in transporting his cargo by land. Held, that this was sufficient damage to support an action for nuisance.

*In **Campbell vs. Paddington Corporation,*** **(1911)** the plaintiff was the owner of a building on London. The funeral procession of King Edward VII was to pass from a highway just in front of the plaintiff's building. An uninterrupted view of the procession could be had from the windows of the plaintiff's building. The plaintiff accepted payments from certain persons who had engaged to occupy seats to view procession from her windows. The defendant Corporation put up unauthorized structure on the high way blocking the view from the plaintiff's windows. The plaintiff field a suit against corporation for loss caused to her by the erection of the structure, which was a public nuisance. Held that she was entitled to such compensation.

Check Your Progress

4. What are the remedies for a public nuisance?

In Barber Vs. Penley due to considerable queues at the defendant's theatre, access to the plaintiff's premises a boarding house became extremely difficult at certain hours. Held that the obstruction was a nuisance and the management of the theatre was liable.

Projection over a highway, which are in a dangerous condition, may constitute a nuisance. In **Tarry Vs. Ashton, (1876)** the occupier of a certain building, which had a large lamp projecting on a highway, several feet across the payment, had employed an experienced fitter to repair the lamp and its fittings. The fittings were in a decayed condition and so the lamp fell on a person walking on the highway. The occupier was held liable in damages.

Private Nuisance: The gist or essence of private nuisance is unreasonable interference with another person's land. Such interference may consist in physical damage to the land or an easement or other, servitude attached to the land; or, in disturbance of the comfort health and convenience of the occupant by offensive smell, noise, smoke or dust. Thus essentials of private nuisance are; 1) unreasonable interference; 2) Such interference is with another person's land, easement, or other servitude attached to the land, or the comfortable use of enjoyment of land; 3) Damage.

Unreasonable interference: Every interference is not a nuisance. An interference is actionable only if the annoyance or discomfort resulting from it is substantial unreasonable. Therefore the paramount problem is to find the best criterion to decide if an activity is a source of nuisance to another or not.

The factors which are usually taken into consideration for this purpose are the reasonableness of the activity in question and the abnormality or otherwise of the person complaining of the activity. It is only in the case of interference with the enjoyment of land as amounting to "nuisance" the question of degree of interference has to be considered to find out whether it is reasonable, or not. The acts complained of as constituting nuisance, such as noise, bad smell or vibration will usually be lawful acts but become wrongful only from the circumstances under which they are performed, such as the time, place, extent or the manner of performance. The usual test applied is what is reasonable according to ordinary usages of man kind living in a particular society.

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In considering what is reasonable, the law does not take note of the abnormal sensitivity in either person or property. An act which is otherwise reasonable does not become unreasonable, if it does not inconvenience a healthy man, but disturbs an invalid. Similarly, a person carrying on a sensitive trade cannot complain of nuisance by something lawfully done by his neighbour on his property. In **Robinson Vs. Kilvert (1889)** the defendant began to manufacture paper boxes in the cellar of a house, the upper part of which was in the occupation of the plaintiff. The defendant's business required dry air and he heated the cellar for this purpose. This affected the stock of brown paper stored in plaintiff's portion but the temperature did not inconvenience his workman and it would not have injured paper generally. It was held that the defendant was not liable as the trade carried on by him was an exceptionally "delicate trade" and what was done by the defendant would not have injured anything else.

When there is nuisance the remedy can be sought for only if it is actionable nuisance. This principle was laid down in the case law, **Periammal Vs. Valarmathi, 1998 (2) L.W. 167** on facts, the Plaintiff filed suit for permanent injunction prohibiting the defendant from starting any rice mill or flour mill. According to Plaintiff installation of such mill will cause grave nuisance and also affect her health. The trial court dismissed the suit on the ground that it is not actionable nuisance. The High Court also upheld the lower court Judgement.

Acts done with the intention of annoying a neighbour and actually causing annoyance will be a nuisance although the same acts would not be a nuisance if done in the ordinary and reasonable use of property. In **Chiristy Vs. Davie. (1893)** the defendant was restrained from making noise on the furniture and crockery in his house, with a view to annoy the plaintiff, a teacher of music, as a measure of retaliation for not stopping the music lessons given by the plaintiff, which, he said was a source of discomfort to him. Injunction was issued against the defendant because he had acted deliberately for the purpose of annoying the plaintiff. The case is authority for the proposition that malice (evil - motive) is relevant in law of tort.

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This case was followed in **Hollywood Silver Fox Farm Ltd. Vs. Emmett (1936)**. In this case the defendant deliberately caused guns to be fired on his own land near the boundary of the plaintiff's land in order to frighten the plaintiff's silver foxes during breeding time. The vixens of these animals are extremely nervous during breeding time and much damage was caused in consequence of the defendant's act, which was done spitefully. The defendant's act was held a nuisance and so injunction and damages were awarded against the defendant.

Interference with another person's land or easement or other servitudes attached to the land: Encroachment by a person projecting a cornice over his neighbour's land or by allowing branches of his trees to overhang his neighbour's land will amount to nuisance interfering with the property of the neighbour. Similarly setting up vibrations, by the working of machinery etc, on - one's land which cause camage to the neighbour's buildings (or) emitting smoke or fumes from one's land (as by brickburning or soap boiling which damage the neighbour's crops or trees) will also amount to interference with neighbour's property and so will be acts of nuisance.

Apart from easement, there are two other kinds of servitudes namely, profit a prendre and licences. The servitude, known as profit a prendre, entitles the owner, the right to take away and appropriate some part of produce or substance of the servient land. To illustrate, the right of fishery which a person A has in a tank belonging to B, is an instance of this type of servitude. It may be noted that an easement entitles a person merely to the use on benefit of the land without any such appropriation. Similarly a licence (dealt with under the Indian Easements Act) gives a subordinate right to a licences in the enjoyment of a property and to enjoy a servitude.

The third essential of nuisance, noticed above is damage. Unlike trespass, which is actionable per se, actual damage is required to be proved in action for nuisance. Under section 33 of the Indian Easements Acts, an action for disturbance of an easement lies only on proof of substantial damage but the doing 'of any act affecting the enjoyment of the easement or materially diminishing the value of the dominant tenement is substantial damage for this purpose. Although

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damages is one of the essentials, the law will often presume it, in certain circumstances. But it must be remembered that in the case of public nuisance; the plaintiff can bring an action only when he proves specific damage to him.

Defence : Besides general defence based on inevitable accident and act of God grant and prescription of a right to do an act, which would otherwise be a nuisance may be acquired by prescription, if such right has been peaceable and openly enjoyed as an easement and as of right without interruption and for 20 years. on the expiry of this period of 20 years. this nuisance becomes legalized from the beginning as if it had been authorized: by a grant of the owner of servant land from the beginning.

Another defence available is statutory authority. An act done under the authority of a statue is a combined defence if nuisance results from an activity authorized as unconditional, there is no liability for the consequential nuisance. It is on this basis that the occupiers of houses adjoining a railway working under statutory powers are deprived in the absence of negligence on the part of railway authority of their remedy for the nuisance of vibration caused by the passing trains or the nuisance arising from the noise of locomotives. Thus in **Vaughan vs. Taft Vale Rly Co. (1860)** defendants who had statutory authority to use locomotive engines on their railway, were held not liable for a fire caused by the escape of sparks from one of their engines, as they had taken all reasonable measures to prevent the escape of sparks. But if the act is done negligently then statutory authority is no defence.

The defendant cannot plead

(i) the plaintiff himself caused the nuisance. Supposing the plaintiff with full knowledge of the nuisance of fumes from a smelting works, buys property in close proximity to the works is still not deprived of his remedy.

(ii) in continuing nuisance-that the defendant is doing all that is reasonable to prevent the nuisance, is no avail to the defendant in an action for nuisance.

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(iii) That the defendant is only making a reasonable use of his property is no defcnce, as non use of property can be reasonable which cause substantial discomfort to other person;

(iv) The defendant will not be allowed to plead that other factors also contributed to the nuisance.

Remedies: (1) Abatement of nuisance, (2) injunction and (3) Damages

6.4. STRICT LIABILITY AND ABSOLUTE LIABILITY

Rule in *Rylands Vs. Fletcher* with its exceptions: Strict liability has its origin in nuisance, but its development was such that it is now quite distinct from it.

In modern law of torts "strict liability" or "absolute liability" without fault i.e., without intention or negligence. Ordinarily, a person is liable only for wrong done intentionally or by negligence, but in certain cases, law holds a person liable for the harm even though the same is unintentional and also without any negligence on his part. This form of liability was first formulated in the case of **Rylands Vs. Fletcher (1866) by Blackburn, J.** The liability created by the rule laid down in this case is known as "strict liability".

The rule of strict liability enunciated in this case may be formulated thus: The occupier of land who brings and keeps upon it, anything likely to do damage (mischief) if it escapes is bound at his peril, to prevent its escape, and is liable for all the direct consequences of its escape even if he has been guilty of no negligence.

The facts of the case are as follow: B, a mill owner constructed a reservoir on his land to provide water to his mill. This construction was made through independent contractors. There were old discussed shafts under the site of the reservoir, which the contractor failed to note and so did not block them. The passage of these shafts communicated with the adjoining mine of the plaintiff A. When the reservoir was filled with water, it (the water) escaped down the shaft and flooded the plaintiff's coal mine of the adjoining land causing damage.

Check Your Progress

5. What is strict Liability?

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The wrong done was not trespass, as the injury was not a direct one but consequential it was not nuisance as the injury was not due to any recurrent condition or state of affairs, it was not negligence, for the defendant had not been negligent. Still the defendant was held liable on the basis of the following well known statement of the rule expounded by Justice Blackburn : "We think that the true rule of law is that the person, who, for his own purpose, brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape". He can excuse himself by showing that the escape was due to the plaintiff's default; or perhaps, that the escape was the consequence of vis major or the act of God; but as nothing of the sort exists here, it is unnecessary to enquire what excuse would be sufficient. It was for liability under this rule the rule of land should be "non-natural". The principle of this case has been termed as the "wild beast theory". It applies to "anything likely to do mischief if it escapes", and accordingly the thing must, like a wild beast or accumulated water, have the power of escape. So far the application of this rule plaintiff has to prove that dangerous substance stored in the defendant's permisses "escaped" to his property and caused loss. Until there is an "escape" of the substance from the occupier's land there is no liability under the rule. This position is explained by the case of **Read Vs. Lions of Co Ltd (1947)** Where the plaintiff was employed as an inspector of munitions in the factory and in the course of her employment, was injured by the explosion of a shell that was being manufactured. There was no evidence of negligence on the part of the defendants. It was held that the defendants were not liable though the shell was a dangerous thing and the rule in **Rylands Vs. Fletcher** did not apply since there was no "escape" of the thing outside the defendant's premises Other things which had attracted application of this rule by their "escape" are fire, gas, electricity oil, noxious fumes, vibration and poisonous tress spreading their breaches over another's land.

Things naturally on the land: It must be noted that the rule in Ryland Vs. Fletcher applies only to things which occupier brings to his land and collects and keeps there. Spontaneous accumulations, like water, birds on his land don't come within this rule. Trees planted or which grow naturally are not a non-

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natural use of and, but to plant a poisonous tree like, Yew is non-natural user and if the plaintiff's horse eats the leaves from an overhanging branch and dies the defendant is liable – **Crowhurst Vs. Amersham Burial Board (1878).** In **Giles Vs. Walker** where large quantities of thirstle seeds were blown by wind from the defendant's land to that of the plaintiffs, it was held that "there can be no duty as between adjoining occupiers to cut the thistles which are the natural growth of the soil". But if the occupier deliberately plants weeds in large quantities and even where things accumulate or grow naturally allow their escape so as to constitute a nuisance, occupier will be liable.

Dangerous thing means things which are likely to escape and in doing so bring about increased danger to others. As in Ryland's case water is not dangerous per se but if allowed to escape in large quantities it becomes a dangerous "thing".

Exceptions to strict liability : As has been indicated in the judgment of the case, the following exceptions are recognized to the application of the rule in **Rylands Vs. Fletcher**.

1) Act of God

2) Default of plaintiff

3) Consent of plaintiff

4) Independent act of third party

5) Statutory authority

6) Common benefit

Act of God : If the escape of substance, which did the mischief was without human intervention and because of natural forces which could not be provided against by human foresight, the defence of act of God be pleaded. Whether a given situation is an act god or not will depend upon facts. In **Greenock Corporation Vs. Caledonion Rly, (1917),** a padding pool for children was constructed by the Corporation diverting the course of a stream. Due to heavy rainfall the pond overflowed and the stream of water, which would have been normally carried by the stream, poured down a public street

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and damaged the plaintiff's property. The House of Lords held the Corporation liable for the natural course of the stream was altered. Please also refer to **Nichols Vs. Marsland** in the Act of God under Defences. In that case the plea of Act of God was accepted.

Default of plaintiff: If the damage is caused by the act or default of the plaintiff himself, he clearly has no remedy. In **Ponting Vs. Noakes, (1824),** the plaintiffs horse reached over the defendant's boundary, nibbled some poisonous tree there and died. It was held that the plaintiff could not recover anything for this as damage was due to the horse's own intrusion and alternately there had not been escape of the poisonous tree.

Consent of plaintiff: The maxim **violenti non fit injuria** is applicable in case where the plaintiff has consented to the accumulation of the dangerous thing in the defendant's land. Such a consent is implied where the source of danger is to the common benefit of both the plaintiff and the defendent.

Independent act of third party: The owner of the dangerous thing is not liable if the thing has escaped through independent act of a third party and there has been no negligence on his part. **Rickard. Vs. Lothian** (1913) in this case some third person blocked up the waste pipe of a lavatory basin on X's premise and there by flooded those of Y. X was held not liable.

Statutory authority: The rule in **Rylands Vs. Fletcher** may be excluded by statute. Whether it is so or not is a question of construction of the particular statute.

Common benefit: Where the injury is caused to the plaintiff by substance stored in the premise for the benefit of both the plaintiff and the defendants, the latter is not liable to the plaintiff. Thus, in **Carstairs Vs. Taylor** the court held that the defendants was not labile to the plaintiff for the damage caused by water stored. In the upper storey was for the benefit of the parties. The defendant here lived in upper storey. A rat gnawed a hole in the water box.

Strict liability principle in India

In the case of absolute liability Justice P.N. Bhagavathi formulated no exception in the case of **M.C. Mehta Vs. Union of India. AIR 1997 SC and 1986**. absolute liability is nothing but strict liability, but in the case of maintainable. In the above case, Shriram Food and fertilizer owning number of units of factory such as manufacture of caustic soda, chlorine and hydrochloric acid, bleaching powder, Vanaspathi, soap, sulphuric acid etc., at in the place in an extent of 76 Acres. On 4-12-1985 from Caustic soda plant unit, ileom gas got leak aged, and the poisonous gas, attacked the nearby residents including one lawyer died and the people got injuries. The Petitioner filed claim application for compensation on the basis to anyone on a account of an accident, in the operation of such hazardous, act inherently dangerous, activity resulting, the enterprise is strictly and absolutely liable to compensate all those who are affected by Accident and such liability is not subject to any' of the exceptions, which operate, vis-à-vis the tortuous principle of strict liability.

On the same facts another case of incident was adjudicated in the case of **Chamanlal Sahu Vs. Union of India (AIR 1990) S.C. 1480**, on 02-12-1984 night the most tragic industrial disaster, recorded in the City of Bhopal in the State of Madhya Pradesh at the night there was massive escape of Gas nearly 3000 persons died and one lakh persons severely injured. The industry was owned by Union Carbide American Company having 50,99% share and Unit Trust and Life Insurance Corporation of India having 20 to 22% shares. In this case also absolute liability principle was formulated.

In another case **M.P. Electricity Board Vs. Shailkumari and other (2002)** on facts one Joginder Singh a workman in a factory, was riding on a bicycle, on the night 23-8-1997 while returning from his factory, he came into contact, electric live wire, under the inundated water, and died. When the compensation was claimed against the Electricity Board, the Electricity board, took the defence as some third party wanted to pilferage electricity by putting hook and the hook fell down an caused death. But the Court rejected the defence of act of stranger and held Electricity Board, undertaking an activity involving hazardous or risky exposures to human life, is liable to compensate the loss.

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Hence in the principle strict liability exceptions are admitted, but in absolute liability no exception is admitted.

6.5. LIABILITY FOR ANIMALS

Another kind of a absolute liability relates to escape of animals with reference to harm caused by animals, the responsibility of the owners of such animals for damage done by them is being considered in this chapter. In one case it was remarked that "the law of torts has grown up historically in separate compartments and...... beasts have traveled in compartments of their own". The damage caused by animals has developed along two main lines, namely one pertaining to the law of trespass and the other pertaining to the law of strict liability.

Strict liability for damage done by; dangerous animals was clearly formulated in **May vs. Burdtett (1846),** wherein the plaintiff had been bitten by a monkey kept by the defendant upon his premises and in answer to the contention of the defendant that he was not liable save for want of proper precautions taken against mischief by it, it was pointed out by Lord Denman C.J. "the conclusion to be drawn from an examination of all the authorities appears to be this; that a person keeping a mischievous animal with knowledge of it propensities is bound to keep it secure at his peril: and that if it does mischief, negligence is presumed without express averment, the negligence is in keeping such an animal after notice".

Scienter Rule

Check Your Progress
6. What is Scienter Rule?

The principle of liability formulated in the above terms in **May vs. Burdett** is known as the **"scienter rule".** The liability of the keeper of an animal under this rule depended upon his knowledge of the dangerous character of animals. If the keeper has not been able to properly control the animals, which he knows or ought to know to have a tendency to do the harm, he is labile. For the purpose of this rule animals are divided into two categories (a) animals **"ferae naturae"** (belonging to a dangerous species) or (b) animals mansutae harmless by nature) Lions, tigers, bear, elephants, zebras and monkeys have been

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considered to be generally dangerous to mankind and are therefore in the first category. Animals of this category are never regarded as safe and no liability is attached or knowledge of their dangerous character was presumed. Animals like a horse, camels, cows, pigs, cats and rabbits on the other hand are considered harmless and their keeper will not be held liable for damage done by them unless it can be proved that he was actually aware of their dangerous disposition.

In **Behrens Vs. Bertram Mills Circus Lts., (1957),** the defendants were operating a circus. Their Burmese elephant which was circus trained, was frightened by the barking of small dog. The elephant went after a dog and knocked down a booth, in which the plaintiff was, causing injury to him. The plaintiff's husband, who was also inside the both, though, not injured, received a considerable shock and so was confined to bed for nine days. It was held that the elephant was animal ferae naturae and the fact that it had been named as a "cow" did not make difference in the liability of the defendant as its keeper.

To fix liability for harm done by animals of the harmless class, two things have to be established: 1.That the animals in question had a vicious propensity which is not common to animals of that species; 2) That the defendant had actual knowledge (proof of scienter) of such viciousness. Proof of knowledge must relate to the particular animal. For example, if the defendant's dog had chased and killed poultry, it is not sufficient to prove that dogs in general would do so; it must be proved that the dog concerned had done so on previous occasion or occasions.

In **Cox Vs. Bulbridge (1863),** where the defendant's horse which was grazing in a field near a road got into the road and kicked a child playing there, it was held that the defendant was not liable as there was no proof of Scienter; nor could he be made liable in trespass as the injury happened not in the plaintiff's premises, but in a high way.

In **Bukle Vs. Holmes (1926)** defendant's cat entered the plaintiff's land there killed 13 of the plaintiff's pigeons. Since the cat in doing so, had followed the ordinary instincts of its kind and there, was no vicious propensity peculiar to this Cat. It's owner was held not liable.

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In **Manton Vs. Brockle Bank, (1923)** the defendant was held not liable for the injury to the plaintiff's horse by his mare kicking it, while both were grazing in another's field.

The law regarding liability for animals has now substantially modified in England by **Animals Act, 1971** the old "scienter" action has been abolished and replaced by the provisions of section 2 of the Act. The Act has classified animals as belonging to dangerous species and those belonging to non-dangerous species. Those which belong to dangerous species have-been defined as an animal which is not commonly domesticated in the British Islands and whose fully grown animals normally has such characteristics that they are likely unless restrained, to cause serve damage or that any damage they may cause is likely to be serve. Even under this act, damage caused by an animal of dangerous species attracts strict liability, as was the law under the scienter action.

The effect of sec.2 of the Act the plaintiff established the keeper's liability by showing that the animals had certain abnormal characteristics and these were known, or must be presumed as known to the keeper.

The Act, provides that it is a defence to an action brought under Sec. 2 that the damage was wholly due to the fault of the person suffering it or that he voluntarily risked in contributory negligence, is of course, a partial defence, as with common law of scienter, the Act requires knowledge of the animal's characteristics.

In India there is no Act similar to the Animals Act, 1971, in vogue in England courts in India being bound to administer law according to sense of justice, equity ,and good conscience, they have not been tied down by any particular rule.

Cattle trespass: Apart from the Scienter rule, formerly cattle trespass was also one of the oldest grounds of liability in English law. It has now been abolished by section 1 (1) of the Animals Act and has been replaced by the following provision in section 4 (1). "Where livestock belonging to any person strays on to the land in the ownership or occupations of another and (a) damage is done by the livestock belonging to any portion of it which in the ownership or possession of the other person, or (b) any expenses are reasonably incurred by

that other person, in keeping the livestock which cannot be restored to the person to whom it belongs, or while it is detained is pursuance of Sec. 7 of this Act, or in ascertaining to whom the person to whom the livestock belong is liable for the damage or expenses, except as otherwise provided by this Act". Livestock, for the purpose of this Act has been defined as cattle, horses asses, mules, hinnies, sheep, plugs goats and poultry. So, strict liability for trespass of cattle subsists. But neither cat nor dog is included in the definition of livestock.

In India there is an Act known as, **Cattle Trespass Act, 1871**. This Act provides for establishment of pounds by the State. Persons on whose land cattle trespass can capture and take them to the pound. The owner of the cattle can take them back from the pound-keeper on payment of the pound fees and other expenses incidental to the keeping of the cattle, but he is not bound to pay any compensation to the owner of the land. Under section 29 of the Act, the right of a person, whose crops or other produce of the land have been damaged by trespass of cattle, to use for compensation in competent courts is saved. The other provisions of the Act relate to wrongful seizure of cattle for alleged trespass and remedies available to the owner of the cattle under such circumstances.

Defences: 1) Plaintiff's contributory negligence. That the plaintiff irritated the animal inviting the trouble upon himself. 2) Plaintiff was a trespasser and so the defendant owed him no duty. 3) Plaintiff undertook the risk, i.e., volenti non fir injuria is pleaded. Any body who undertakes to keep a vicious horse if injured by it cannot use the master or the owner. So too the defendant owes no duty to licensee beyond merely warning them. 4) Act of God; if the escape is due to an Act of God no liability attaches to its owner. 5) Act of third party. If a stranger let an animal loose or irritated it to do mischief then the owner cannot be held liable.

Ordinary liability in tort for animals: It is possible to commit various torts through the instrumentality of an animal. Nuisance may be committed through the stench of pigs or maintaining a stable near a near a neighbour's house or obstructing a right of way through animals. Similarly, torts of assault and battery can be committed by a setting dog on passerby and the tort of negligence by trying an unruly horse in a crowded place or by conducting an unbroken bullock on a highway, where it is likely to be frightened by cars or light.

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Liability for dangerous chattels: Chattels or things are classified as those which are dangerous and those which are not so. Most things are sources of danger if they are used negligently or intentionally to cause harm. Even a stick wielded negligently or unlighted heap of stones on a public road during night can be a source of danger in the circumstances mentioned above. Such things however, impose liability for negligence of the person responsible resulting in harm to others. It is the circumstance under which the thing in question is used or left rather than the thing itself which had given rise to the danger.

On the other hand, there are chattels or things which are dangerous in all the circumstances of the case. These thing differ from the things which are not dangerous by themselves in that the dangerous character is due to their inherent quality i.e., quality of the things themselves and not from any external circumstances.

The following cases illustrate this principle, **Dixon Vs. Bell (1816)**. The defendant sent his servant, a girl aged about thirteen or fourteen to a friend's house to fetch his guns, sending through her a note to the friend to remove the firing first before giving the gun to the girl. The friend did so and sent the gun through her. On her way home, she pointed it in fun at the plaintiff's son and pulled the trigger. The gun went off because some powder was still left and the plaintiff's son was injured. It was held that the defendant was liable as he ought to have rendered the gun harmless before allowing the girl to handle it.

Williams Vs. Eady, (1893), A school-master kept a bottle of phosphorous in a room where the student's cricket-things were kept. A boy carried off the bottle to the playground where it exploded causing injuries to another boy. Held, the school-master was liable.

Dominion Natural Gas Co. vs. Collins (1909). A gas company installed an apparatus for the supply of natural gas to a railway company. The gas was supplied was very heavy pressure and so, to make it fit for use, a regulator with a safety valve was fitted to it. By the negligence of the gas company the safety valve was wrongly fitted. As a result of it, an explosion occurred killing injuring another of the railway company's servants. It was held that, gas was a dangerous

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chattel and the gas company, having been negligent in their peculiar duty to take precaution, were liable.

Incidence of the liability: The liability of owners of dangerous chattel can be analyzed and examined as (1) the liability to immediate transferee. (2) the liability towards ultimate transferee.

Liability to immediate transferee: Where a chattel is under a contract, the liability of the parties is regulated by the terms of the contract. If the plaintiff is injured by a chattel transferred to him under a contract he will be able to claim damages for the breach of some term, express or implied, in the contract. If the goods contain harmful ingredients causing damage to the purchaser the seller is liable for the harm suffered. Thus, a seller of woolen underwear was held liable in damages for dermatitis (a skin disease) caused by the presence in excess of certain chemicals in them: another seller, for a hot-water bottle, burning though properly applied, on account of its defective condition.

In **Clarke Vs. Army and Navy Co-operative society (1903)** the plaintiff bought a tin of disinfectant powder from the defendant, a co-operative society. The manager of the society had instructed their servants to warm purchasers about taking care in opening then but the plaintiff had not been so warned. She opened the tin and its contents flew into her eyes and injured her. Held that the defendants were liable.

The extent of duty of responsibility owned by the transferor depends upon the position of the transferee, i.e., whether he is a bailee for hire or a gratuitous bailee. In a contract of bailment, when the goods bailed for hire expose the bailee' to extra-ordinary risks the bailor is responsible for the loss caused by such goods and he cannot plead ignorance as an excuse. On the other hand, in gratuitous bailment, the duty of the bailor is only to disclose or give warning of defects, for which he is aware.

In **Hyman Vs. Nye, (1881)** the plaintiff hired from the defendant a carriage and horse for a particular journey. During the journey a bolt in the under part, of the carriage broke and the plaintiff was injured. Since the carriage was not reasonably fit for the purpose for which it was hired the defendant was held liable.

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When making a contract, the parties are free to exclude liability by the term of the contract. Thus, in **Ward vs. Hobbs (1878)**. A sold pigs to B "with all their faults" and some of them were found suffering from typhoid fever which was known to the defendant. Those pigs and some of the plaintiffs other pigs, which got infected by typhoid, died. Held that the contract excluded liability of defendant and he was not liable.

Liability To Ultimate Transferee: It remains now to consider the liability of a person who delivers, a person who delivers, a dangerous chattel to another but damage is suffered not by recipient himself but by some third person who is the ultimate transferee to the chattle, for example when A sells or gives a defective gun to B, who in turn, or gives it to C, who is injured by its bursting, is A under any liability to C such liability exists in the following two cases.

1) Fraud: The defendant is liable if he has fraudulently represented the article to be safe and so misleads the recipient into causing damage to plaintiff. **Langridge Vs. Levy (1837),** illustrates this. The defendant sold to the plaintiff's father for the use of the plaintiff a gun which fraudulently stated to be good make and the plaintiff having been injured by the bursting of the gun was held entitled to recover damage from the seller though there was no contract between them.

2) Negligence: The defendant is liable if he has been guity of a breach of duty of care owed to the plaintiff. On this aspect the case law in England, before 1932 was uncertain. It was thought, before 1932, that there was no liability on the part of manufacture of goods of the ultimate consumer or used with whom there was no contractual relationship, when there was no fraud and· when manufacturer did not know the articles to be dangerous and article did not belong to the category of article and inherently dangerous. The privity of contract fallacy was exploded in 1932 in the case of **Donoghue Vs. Stevenson (1932).** The facts of this case have been adverted to in Negligence. In this case in liability of products for harm suffered by a consumer by his (manufacturer's) negligence come to be decided. Lord Atkin formulated the following rule in this case; A manufacturer of products, which he sells in such a form as to show that he in extends them to

reach the ultimate consumer in the form in which they left him, with no reasonable possibility of intermediate examination and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take reasonable care".

The principle, as formulated above has been extended to repairers assemblers, builders and suppliers. Thus in **Brown Vs. Cotteril (1934),** the plaintiff, an infant, was helping to arrange flowers on her grandmother's grave when a nearby tombstone erected negligently by the defendants fell upon her causing injuries. The defendants were held liable under the above rule.

The application of the rule has also been extended to cover goods other than food drink. For example, it has been held to include underwear, motor-cars, hair-dyes, tomb-stones and lifts. **Grant vs. Australian Knitting Mills.**

In **Evans Vs. Triples Safety Glass Co., Ltd, (1936),** the plaintiff brought a motor car fitted with "Tiplex Toughened Safety Glass" wind screen of the defendant's manufacture. A year later, when the car was being used, the wind screen suddenly and without any apparent reason broke into many fragments and injured the occupants of the car. The defendants were held not liable for the following reasons. a) the lapse of time between the purchase and the accident. b) the possibility of the glass have been strained when screwed into its frame: c) the opportunity of intermediate examination by the intermediate seller, and d) the breaking of the glass may have been caused by something other than the defect in manufacture.

In such cases, the question to be asked is whether the cause of the plaintiff's injury was the defect in the article or the plaintiff's own misuse of it.

The rule in **Donoghue Vs. Stevenson** applies when the thing is to reach the ultimate consumer user as it is without any possibility of intermediate examination. If the manufacturer had given sufficient warning of the risk of user without prior examination, he may escape liability and shift the responsibility to another. Thus, in **Kubbach Vs. Hollands, (1937)**, a manufacturer sold to a retail chemist a chemical with an express warning that it has to be tested before using. The retail chemist sold it to a school without making the necessary examination

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or test and without passing on the warning. The manufacture was held not liable for the resulting injury, but retail chemist wash liable.

6.6. LIABILITY FOR LAND AND DANGEROUS STRUCTURES OF PREMISES

The liability for dangerous structures is part of the law of negligence, and is only a special head of the general doctrine of negligence. To fix liability for injury suffered by persons, while on other's premise as a result of the dangerous state of the premises, England Courts have evolved certain principles and decided the issue of negligence. The standard of care expected of the occupier of the premises towards persons entering there depended upon the category of persons entering. A distinction was drawn between persons entering the premises under a contract but by invitation or permission, express or implied, on the part of the occupier and persons, who were there without any permission, i.e., trespassers. Again the category of persons who came by permission, express or implied, on to the premises, was subdivided into two classes namely, invitees and licensees.

The liability for dangerous structures was considered in relation to four categories of persons, namely : 1. Those entering in pursuance of a contract;

2. Invitee-one who (without any contract) entered on business interest of both himself and the occupier, 3. In the second category are those who enter as: so right with permission and without permission i.e., a trespasser. With permission we have an invite and a licensee 4. Passerby.

The degree of care owed by the occupier to each one of these categories was graded, diminishing from the first grade, in gradual degrees, to the last grade above mentioned. In other words, the highest degree of care was owed by the occupier to one who entered in pursuance on contract with him, a lesser degree of care to the invitee still lesser to the licence and scarcely any to the trespasser.

Before the passing of the **Occupier's liability Act, 1957,** the liability of an occupier of premises at common Law may be detailed here below: person entering as of right: A bill collector and a bailiff are entitled to have premises made safe for them, and not merely warned of the danger.

An invitee is a person who enters upon the invitation of the occupier for the purpose of some business or matter which concerns the occupier. So the invitor had a material interest in the invitee. The distinction between an invitee and a licensee is that, in the case of the former, invitor and invitee have a common interest while the licensor and licensee have none. Even a prospective customer enters a shop, whether he buys or not, is an invitee, a guest is only a licensee.

An invitee who enters on the express invitation of the occupier should be warned of the danger known to the occupier, or which with reasonable diligence, the occupier could have discovered.

In **Indennaur Vs. Dames (1866)** the court laid down the rule of an occupier's duty towards his invitee. The plaintiff was journey man gas-fitter employed by X under a contract with the defendant. X had fitted a patent gas regulator in the sugar-refinery of the defendant. X and plaintiff went to test some burners in the premises in connection with his regulator. While doing so, the plaintiff without any fault on his own part fell through an unfenced shaft and was injured. The defendant was held liable. But if the invitee had full knowledge of the danger, then there is no breach of duty of the occupier.

In **Weigall Vs. Westminister (1936)** the doctor invited the plaintiff to a small room to discuss her son's illness. The floor was so highly polished that she slipped with a doormat on the floor fell and hurt herself. It was held that the plaintiff was an invitee to the hospital and could recover damages.

In the Indian case of **Cates Vs. Mongni (1917)** a lady having tea in a restaurant, sitting under a fan had it stopped by the waiter. The fan fell on her and injured her. The cause of the fall was a latent defect in the metal of the suspension rod. Though the lady is an invitee, here the defect is not discernible and cannot be discovered by exercise of reasonable care, so she cannot recover.

Licensee: A licensee or "bare licensee" is one who has the express or implied permission to enter for his own purpose, but not for the occupier's business or material interest. A guest is a licensee. It is the duty of a licensee to keep within the bounds of the permission accorded to him.

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The occupier (1) must warn licensee of and concealed danger (or trap) of which the occupier knows; (2) he should not alter the character of the place (i) by placing on it dangerous obstructions or (ii) by affecting the condition of the property whereby the danger is increased without notice.

Fairman Vs. Perpetual investment Building Society, (1923) was a case where the defendants owned a block of flats which they left to servants. The cement staircase leading to the various flats was under the possession and control of defendants. The staircase was worn out. The plaintiff, the sister-in-law of one tenant, staying with him and her sister, while descending the stairs caught her heel in one of the depressions, fell down and was hurt. It was held that the C defendants were not liable, as the only duty owed by the defendants to the plaintiff was not to expose her to a concealed danger fall was obvious and could have been seen by her if she had looked property.

In **Cook Vs. Midland Western Rly Co (1909)** the defendant railway company had tacity allowed children to enter upon the railway premises and there to amuse themselves by moving a turn table, were held liable for injuries suffered by the children. It was observed, that the duty in such cases was not merely to give notice of the danger but taking due care to avoid it.

Passerby is one who lawfully passes by the premises. The owner has a duty which extends to guarding against what may happen just beyond the premises, on the road or any place near the premises where he may lawfully be. In **Morrison Vs. Mayor etc. (1917)** the municipality which had planted tress on the road side 'had provided spiked Iron guards around It. When the streets are lighted the guards are visible. But on account of black-out restrictions, the plaintiff dashed against the guards and injured himself. It was held that these guards under the blackout regulations became a danger and the Municipality was bound to take measures to remove the danger, and in not doing so were liable.

Check Your Progress

7. Explain occupiers' Liability Act, 1957.

Occupier's liability Act, 1957: Difficulties were experienced in the application of principles defining the duty to the occupier towards various categories of persons and in sorting out to which category, in particular amongst the "invitee" and "lincenses" the entrants were to be placed. So the need for statutory change to eliminate these difficulties was felt. In 1957, the rules of the

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Common Law evolved by decided cases about the duty owed by an occupier of premises, to his visitors, in respect of injury due to the state of the premises, were replaced in England, by enacting the Occupier's Liability Act, 1957 the main purpose the Act was to provide, the rules and a Common duty of care to replace the rules of the common law under which the duty owned by an occupier of premises differed according as the visitor was an invitee or a licence.

The term "Occupier of premises" means "persons in possession and control of the property". If several persons are in possession or control it must be ascertained who has the control of it. Thus an occupier may be an owner in occupation, a tenant, lincensee or any person who has right to possess at the relevant time.

The Occupier's Liability Act, provides the common law duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises of things done or omitted to be done to them. See 4 of the Act deals with the duty of the occupier of premises to person who enter his premises under a right conferred by a contract with him.

The first important change made by this Act is to substitute a "common duty" for the different duties owed at Common Law to different classes of visitors. However the rules evolved by prior decisions to determine "who is an occupier still holds good".

The distinction between invitees on the one hand and licensees on the other, having been abolished under the Act, it is necessary to decide who is a visitor for the purpose of the Act. The invitation or permission given by the occupier to another to enter or use his premises need not be express; it may be inferred. A lincence may be implied when the public habitually use the premises to the knowledge of the occupier and no steps are taken to prevent the user. In **Edwards Vs. Railway Executive (1952)** plaintiff, a boy of nine, got through a fence dividing the recreation ground from a railway climbed up the embankment to fetch a fall on the other side of the railway line, an was injured by the train. It was found that for many years children had climbed through the fence by breaking the wire to side down the embankment. The Railway Executive knew this and had repaired the fence whenever damage had been observed. It was held

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that the repeated trespass itself confers on licence . . . how is it to be said that the occupier has licensed what he cannot prevent? And so the Railway was not liable.

In **Lowery vs. Walker (1911)** for 35 years the public had used a short-cut across a farmer's field to a railway station. He had prevented them from doing so but had ever taken legal proceedings against them for trespass. The House of Lords upheld the finding that they were licensees and not trespassers and that one of them who was injured by a savage house which the farmer had turned into the field without notices could recover against him. It must be noted that this case concerns children and so it has been suggested that it might be rather easily or imply a licence in favour of a child than in favour of an adult.

The duty owed to a visitor does not extend to anyone who is injured by group where he is expressly or impliedly warned by the occupier not to go as where a man falls over a cliff by getting on the wrong side of the railings erected by the proprietor who has put up a notice of the danger of going near that cliff. Further, the duty does not protect a visitor who goes to a part of the premises where no one would reasonably expect him to go.

Obligation towards trespasser :- The Occupier's Liability Act 1957 regulated the liability of an occupier towards lawful visitors only. The occupier's liability towards a trespasser, therefore is not affected by the Act and continues to be the same as before under the Common Law.

The question arises who is a trespasser? A trespasser, is a person who has neither right nor permission to enter into premises. He is one "who goes on the land without invitation of any sort or whose presence is either unknown to the proprietor or, if known, is practically objected to".

Formerly an occupier was liable to a trespasser if he injured him intentionally or recklessly, but was not liable if he injured him by some negligence. But this rule about trespasser was considered extremely harsh and so a more sympathetic rule in favour of trespassers was evolved by later decisions.

The old rule is stated in the leading case of **Robert Addie & Sons (Collieries) Ltd. Vs. Dumbreck (1929)**. The defendants who were colliery owner, had a field in part of the premises in which a wheel used to work forming

part of a haulage system. The wheel was set in motion by a switch, the operator of which could not see the wheel when he sets it going. To the defendants know edge children used to enter the land at play around the wheel although his servant used to drive them off whenever he says them. One day the plaintiff's son, a child of four years while playing in the proximity of the wheel, was crushed to death when the wheel was set in motion, without the defendant's servant checking to see that no one was playing near it. It was held that the child was a trespasser and "the trespasser came on to the premises on his own risk". The occupier in such cases, is liable only where the injury is due to some willful act involving something more than absence or reasonable care". So the defendant was held not liable.

By a later decision in **British Railway Board Vs. Hernington** the law adumbrated in Addie's case regarding occupier's liability to trespassers was completely changed. The facts of this case were. The plaintiff, a boy aged six who had been playing in a field freely open to the public and frequented by children went through a gap in a fence adjoining an electrified railway track run by British Railway Board and was seriously burnt by the live rail. The fence had become detached from a supporting post and had left gap to be used by people as short cut across the line. Several times: weeks railway employees had reported that children had been seen on the line but the British Railway Board had done nothing to repair the fence. The House of Lords unanimously held the defendant liable refusing to follow Addie's case, observing that the said case would have been decided differently today.

Child trespasser: The tendency of children of tender years to be mischievous imposes a greater duty of care on the occupiers of premises, towards them. What is obviously dangerous for an adult may be a trap for the children. They may not be able to appreciate the danger or understand a warning notice, and so, the occupier must guard a child entrant which adults not need any protection.

In **Glasgow Corporation vs. Taylor (1922)** a child aged 7 had died by eating poisonous berries which he had picked from a public garden under the control of the Corporation. The berries looked like cherries and were of a very

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tempting appearance to children. Thus they constituted an "allurement" of the children. Corporation was aware of their poisonous nature, but nevertheless, the shrub was not properly fenced from the public. It was held that though the child had no right to pluck the berries the Corporation had no right to tempt the child to its death or expose it to temptation regardless of consequences and was liable.

In **Mourton Vs. Poulter (1930)** a piece of land adjoining a highway was unfenced and used as playground by children without any licence from the owner. The defendant was engaged by the owner to cut down a huge tree. The children who were trespassing were warned frequently but not when the last root was cut and the tree was about to fall. A boy was injured by the falling tree, held that the defendant owed a duty often to a trespasser, not to do any act, which would alter the condition of the land might injure him, without giving him warning and he was liable. In **Bird Vs. Holdrook (1828)** the plaintiff a boy trespasser, to capture a fowl which had run into the defendant's garden was injured by a spring gun on the land. The defendant was held liable.

Law in India : In India there is no Act corresponding to the Occupier's Liability Act, 1957, of England. Courts in India are free to adopt the new law prevailing: in preference to the old, which he has been superseded there. In this connection the provisions of the Indian Easements Act, 1832 have to be borne in mind. Sections 57 and 58 of the Act impose the following duties on the licensor towards licensee.

Sec.57 : The grantor of a licence is bound to disclose to the licensee any defect in the property affected by the licence likely to be dangerous to the person or property of the licensee, is not aware.

Sec. 58 : The grantor of a licence is bound not to do anything likely. to render the property affected by the licence dangerous to the person or property of the licensee.

The licensor is under an obligation to discloser to the licensee traps, latent; defects or hidden dangerous of which he knows and which are not known to the licensee. In **Lakshmichand Khetsey Punje Vs. Ritan Bai (1957)** the tenant of the 4th floor of a building was killed by the fall of a wall of the privy. The fall was due to a structural defect in the wall of which the landlord was

aware, and of which he had control for effecting repairs, but had failed to carry out the repairs. It was held that the landlord had failed in the duty imposed upon him under sec. 57 of the Easements Act and was, therefore, liable to pay compensation. So far as level crossing is concerned the Railway companies are bound by statutes to shut the gates of a level crossing while a trains is approaching. If they omit to do so, they invite person to cross the line and thereby put them off their guard and are liable for the company. It is for the plaintiff to prove negligence of the company and that it is the negligence which is the cause of the injuries. In **Dayasukor Vs. B.B.C.I.R. (1914)** the plaintiff who was driving a car finding the gates of a level crossing open, tried to cross the rail, while so doing an engine collided with the car and broke it. The court held that the gates when open there was invitation to all comers to cross the line and therefore their company will be liable.

6.7. SUMMARY

Wrongs to property classified in two types. (i) wrongs to Immovable property (ii) Wrongs to movable property. The wrongs to immovable property fall under four categories. (i) Trespass (ii) Injury to reversion (iii) Injury to corporal rights (iv) Injury not amounting to trespass. Similarly wrongs related to movable property are classified in two types namely (i) Conversion (ii) Physical injury not amounting to trespass. All these wrongs were explained in this lesson with illustrative cases.

Nuisance is a separate tort. **Rylands Vs. Fletcher** rule explain the strict liability. In India the Supreme court has adopted the absolute liability principle. We have discussed detail in this unit.

6.8. ANSWER TO CHECK YOUR PROGRESS

1. Refer 6.1
2. Refer 6.1
3. Refer 6.3
4. Refer 6.3
5. Refer 6.4

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6. Refer 6.5

7. Refer 6.6

6.9. KEYWORDS

Reversion	-	condition of being turned in the reverse order
Bailee	-	person to whome goods are given in bailment
Conversion	-	beeing converted
Vincinity	-	the neighbourhood
Annoyance	-	the act of annoying
Servitudes	-	slavery

6.10. MODEL QUESTIONS

1. State the rule laid down by the House of Lords with regard to strict liability. State whether this rule is approved by the supreme court.

2. Discuss the law relating to Cattle trespass

3. Distinguish between :

   (a) Trespass and Conversion

   (b) Malice in law and Malice in fact

4. Distinguish between public nuisance and private nuisance. What are the defences available against an action for nuisance?

UNIT – 7

SPECIFIC TORTS – TORTS AGAINST REPUTATION

INTRODUCTION

Defamation is injury to the reputation of a person. If a person injures the reputation of another, he does so at his own risk, as in the case of an interference with the property. We know very well a man's reputation is his property, and considered more valuable than other properties. With the advancement of technology, this branch of torts have also expanded the scope of dimension of defamative matters. Now let us proceed to discuss more about the law relating to defamation.

UNIT OBJECTIVES

- To understand the wrong affecting the reputation
- To study the Defamation under the English and Indian law
- To analyse the essentials of the Defamation
- To know more about the Defences and Privileges against the Defamation

UNIT STRUCTURE

7.1 Defamation

7.2 Libel and Slander

7.3 Distinction between slander and libel

7.4 Essentials of defamation

7.5 Defences

7.6 Privileges

7.7 Defamation by or to husband and wife

7.8 Summary

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7.9 Answer to Check you progress

7.10 Key words

7.11 Model questions

7.1. DEFAMATION

Law recognized, from early times the right of every individual during his lifetime unimpaired possession of his reputation and good name and gave protection against infringement by others. Till comparatively recent times, the practice of waging a duel for vindicating one's honour and good name, was prevalent in England and other European countries. This was sought to be put down by law. To furnish a legal substitute for prohibited duel in such cases, the law of defamation was developed in England and action for defamation became more common. The invention of printing and the consequential development of journalism gave impetus to the growth of this branch of law. So also the invention of broadcasting and introduction of television have extended the scope of dissemination of defarmative matter.

The aim of the law, all over the years, has been not only to prevent breaches of peace but also to make people to adhere to standards of speech and writing, which would preserve social honour and harmony and encourage co-operative efforts avoiding strife in public life.

Defamation is both a civil and criminal wrong. Mischief to the private individual is the basis of the tort of defamation, while mischief to community is the basis of the criminal offence of defamation. The person defamed may prefer to seek redress by an action for damages instead of setting up the criminal law in motion. Hence, it has become a great responsibility of courts to decide action for defamation in such a manner that on the one hand defamation is made an expensive pastime and on the other hand as to cripple unreasonable or speculative litigation and thereby secure appropriate balance.

The wrong defamation has been defined by Winfield as "publication of a statement, which tends to lower a person in the estimation of right-thinking members of society generally, or which tends to make then shun or avoid that person". The estimation in which the person is held in the opinion of others is his

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reputation. Formerly, it was thought that the defamation was confined to the publication of a statement which tended to bring a person "into hatred, contempt or ridicule". Now it has been recognized that restrictive definition is not adequate and if the publication tends to cause the shunning or avoidance of the defamed person by others, that would also amount to defamation. Thus in **Yussoupoff Vs. Metro Goldwin Mayer Pictures Ltd., (1934),** where a cinematograph film falsely (imputed the plaintiff, a Russian princess, had been raped by the notorious monk, Rusputin, it was held the this tended "to make the plaintiff be shunned or avoided and that without any moral discredit on her part" and so it was defamation.

Defamation is the wrong by a person to another's reputation by words, signs or visible representation. Thus it is different on the only hand from wrongful acts which injure reputation e.g. assault involving disgrace or malicious prosection and on the others from words which cause damage to a person's property or business and not to his reputation e.g. injuries falsehood or slander of to title. Defamation also differs from insult by words or representations. The former is a wrong done to the regard or esteem in which one is held by others and requires publication and the latter is an injury only to one's dignity or self respect and does not require publication to a third party.

7.2. LIBEL AND SLANDER

Defamation has been classified into two heads:- Libel and Slander. A libel consists of a defamatory statement or representation in permanent form. This term properly indicates something printed or written, but it includes also anything in a more or less permanent form, such as painting of picture, effigy, caricature advertisement talking film or by any disparaging object. Slander, on the other hand, denotes defamations made by spoken words or by some other transitory from, whether visible, or audible such as gestures or inarticulate but significant sounds. It may broadly be stated that whereas a libel is addressed to the eye, slender is addressed to the ear. But it must be mentioned that in England by the provisions of a statute known as **The Defamation Act, 1952** broadcasting both by radio and television has been treated as publication in permanent form and therefore as libel.

Check Your Progress

1. What is libel?

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The question whether a statement or representation falls within the category of libel or slander is important in England, but it is not material in India where both are treated alike. Anyhow, the difference between slander and libel in England may be noticed briefly for the sake of completeness. There are two important differences between them: 1) Libel is not merely an actionable tort, but also a criminal Act, but slander is only a civil injury 2) Libel is in all cases actionable Perse i.e. without proof of special damage. In slander special damage must be proved except in six exceptional cases viz.,

i) Where there is imputation of criminal offence with at least imprisonment in the first instance e.g. if A falsely says that B was convicted of a breach of a parking rule under the motor Vehicles Act, it is defamation but not so if B is accused of theft.

ii) Where there is an imputation of contagious or infectious disease likely to prevent other persons from associating with plaintiff (e.g. veneral disease, plague, leprosy), the imputation must be that the plaintiff was suffering from the disease at the time the words were spoken and not at some time in the past.

iii) Where there is imputation of unchastity or adultery to any women or girl; thus to call a women lesbian amounts to defamation. **Kerry Vs. Kennedy** (1942).

iv) According to the Act of 1952: the old rule? that absence of intention was no defence to an action for libel or slander is now modified. Under the present act if the defendant is able to prove that he made the defamatory publication innocently and makes an offer of amends, he is in such a case held not liable.

v) Where there is an imputation of unfitness, dishonesty or incompetence any office, profession or trade carried on by the plaintiff, the imputation must be in the way of his business or office then only is actionable Per se.

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In England, the law governing defamation has been altered in certain important respects by the Defamation Act, 1952.

In India both libel and slander are criminal offences as defined under section 499 of the Indian Penal Code and also actionable with out proof of special damage. A person who calls a medical practitioner a quack, or says that "he is not fit to treat a dog" or that he has ignorantly or unskillfully administered wrong medicine or an overdose of medicine or that other patients have died owing to his want of skill or care, commits defamation.

The Calcutta High Court has held that imputation unchastity is not actionable in the absence of proof of special damage. The Madras High Court has taken contrary view in **Hirabai Vs. Dinshaw (1926).** The Bombay High Court held that attributing unchastity to parish married woman is actionable without proof of special damage, as adultery is an offence under the Penal Code **Gaya Vs. Mohobir, (1926) Luck 386** to say of a high caste woman that she belongs to a lower caste is defamatory not only to her, but also of her husband, he having married a woman of a lower caste. Such an allegation is actionable without proof of special damage. calling a lower caste women by her own caste is an office, under civil rights protection Act.

7.3. DISTINCTION BETWEEN SLANDER AND LIBEL:

1. Slander is spoken defamation addressed to the ear, libel is written defamation addressed to the eye.

2. Libel is defamation in a permanent form whether it is exhibited to the eyes, as in effigy caricature, or to the ear as in photographic record; whereas slander is transient whether it is by spoken word or gestures.

3. Libel both a tort and crime, but slander is only a tort in England. But in India both libel and slander are Criminal as well as Civil wrong.

4. Libel is actionable per se, slander is not except in the six cases mentioned above.

Check Your Progress

2. What are the difference between Libel and Slander?

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5. Libel shows deliberation and raises a suggestion of malice slander may be uttered in heat of the moment and under sudden provocation.

6. The actual publisher of libel may be an innocent person and therefore, not libel. Whereas in the case of slander, the publisher acts consciously voluntarily and must necessarily be guilty.

7. An action for libel in England is barred after six years, and two years for slander. In India the period of limitation is one year for both.

7.4. ESSENTIALs OF DEFAMATION

Whether defamation consists of libel or slander the following requisites are common to both and must be proved by the plaintiff in an action for defamation:

1. The words must be defamatory.
2. They refer to the plaintiff
3. They are "maliciously" published.

The words must be defamatory:

The statement must be such as to lower a person in the estimation of right-thinking members of society generally. Whether a statement is defamatory or not will depend upon how reasonable members of society are likely to take it. The standard of opinion is that which prevails among ordinary reasonable men of the time and place when the statement is made and not on the opinion which prevailed at another time or in another country. For example in India, words alleging a violation of caste rules would formerly have been considered as defamatory since such violation might involve exclusion from caste or loss of caste. But in modern condition, such words may not be held defamatory.

Check Your Progress

3. What are the essentials of a defamation?

In determining whether the words are defamatory they may be one of the three following types:-

1) Words primea facie or obviously defamtory.

2) Words prima facie or obviously innocent but defamatory in the light of facts and circumstances known to persons to whom the words are published.

3) Words prima facie ambiguous.

Before analyzing the three types of statements, we must distinguish between words, which are uttered by way of mere abuse and words which are defamatory. Mere insult or vulgar abuse does not amount to defamation, whether it be spoken or written. As pointed out earlier, defamation outrages the reputation of a person, but words of insult offend a person's pride or sense of dignity rather than bring down his reputation. Remarks if intended as a mere abuse and so understood by the hearer are not actionable. Much of course, will depend upon the manner and surrounding circumstances in which the words are spoken.

In **Penfold Vs. West Cete (1806)** where, the defendant called out "Why? don't you come out blackguard, rascal scoundrel penfold, you are a thief'. It was held by the jury, that words were defamatory.

The speaker of the words, in such cases, takes the risk of his hearers constructing them as defamatory and simply abusive and if so construed he will liable for defamation.

Words prima facie or obviously defamatory:- The typical case of defamation is an attack upon the moral character of the plaintiff attributing to him any from of disgraceful conduct such as crime, dishonesty and untruthfulness, ingratitude or cruelty. But a statement tending to bring a person into ridicule or contempt, even though there is no suggestion of any form of misconduct on his part, may also be defamatory. To illustrate it may be defamatory for publisher to attribute falsely the authorship of an inferior book to a well renowned writer.

A few examples at random may illustrate what are and what are not defamatory words. It may be defamatory to call a man a hypocrite, or a black sheep or a habitual drunkard, to say that motorist drove negligently is defamatory.

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In **Narayana Vs. Narayana (1961)** the plaintiff was referred to in publication as a "Godseite" or "a member of the Godse group". Godse being well-known to have been convicted for the murder of Mahatma Gandhi, it was held, to call him falsely by such expressions was highly defamatory per se.

2) Words prima facie or obviously innocent but defamatory in the light of facts and circumstances known to persons to whom the words are published-Innuendo.

Sometimes the statement or language used is apparently innocent being capable on the face of it of two meanings, the one defamatory and the other innocent. Even a statement of commendation may be in defamatory.

A statement that, if the defendant published, of John Smith, "His name is certainly not George Washington", then however much the defendant may argue that the words constitute a harmless statement concerned merely with names the natural and ordinary implication of the words is that John Smith is untruthful. This is called innuendo. An innuendo is defamatory imputation where by extrinsic fact known to the reader import into the words some secondary meaning as an addition or alteration of the ordinary meaning. If the words are not defamatory in their ordinary meaning the plaintiff will fail unless he can prove the meaning alleged in the innuendo. In **Morrison Vs. Ritchie & Co** the defendant published, in good faith, a statement in his newspaper that the plaintiff had given birth to a child. That statement, by itself was not defamatory, though false since she was married only a month before. The plaintiff adduced evidence, to show that some persons who knew this fact believed the report. Held that the news item was defamatory and that plaintiff was entitled to recover damages.

In **Tolly Vs. Fry & Sons Ltd. (1931)** the plaintiff, a famous gulf champion, was caricatured by the defendants, without his knowledge or consent. In an advertisement of their chocolate, protruding form his pocket. A clown was represented with him who also had a packet of Fry's chocolate, the excellence of which – he extolled in some verses, by comparing it to the excellence of the plaintiffs. it was held that the caricature was capable of conveying a defamatory

meaning, viz, that the plaintiff was abusing his position as an amateur golfer for advertising purposes and was seeking gain by such means.

Other cases which illustrate defamatory by innuendo are - **Lewis Vs. Daily Telegraph Ltd.(1964).** The defendants published a statement that the Fraud Squad of the City of London police were inquiring into the affairs of the plaintiffs firm. The **House of** Lords held the statement to be defamatory because the simple statement **that the** Fraud squad were inquiring into the plaintiff affairs might damage his reputation even though it was consistent with his innocence.

Capital and counties Bank Ltd, vs. Henry (1882) : Henry & Sons a firm of brewers, were in the habit of receiving payment from their customers by cheques drawn on the branches of the Capital and Countries Bank. As a result of some dispute with the manager of the plaintiffs bank the defendants sent to the customers a printed circular containing the following words. "Henry & Sons hereby given notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank". The issuing of the circular became known to other persons and there was a run on the bank, who thereupon sued the defendants for libel. The plaintiffs alleged that the words meant that "they were not to be relied upon to meet the cheques drawn upon them and their position was such that they were not to be trusted to cash the cheques of their customers. It was held by the House of Lords that the words were not defamatory in their natural and ordinary meaning and that the absence of any evidence that there were facts known to the customers which would reasonably induce them to understand the words in the manner suggested they were not libelous.

Cassidy Vs. Daily Mirror Newspaper Ltd. (1929) the defendants in their newspaper, published a photograph of one C and Miss X, with the following words under it "Mr. C the race horse owner and Miss, X whose engagement has been announced". They were held liable in a suit by a person who said she was the lawful wife of Mr. C and complained that the words suggested that she was living with him in immorality. The defendants no doubt did not know of this fact and had also the authority of "Mr. C to publish the item of news." Held that defendant's liability could be

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rested on their failure to make independent enquiry and so the plaintiff was entitled to recover the damage for aspersion cast on her moral character.

In the third class of cases where the words used prima facie are not defamatory. The plaintiff must expressly set forth the defamatory sense which he attributes to them.

Reference to the Plaintiff

In order to be actionable the defamatory words must be understood to be published of and concerning the plaintiff. There is no rule that for the statement to be defamatory of the plaintiff it must contain some pointer or key indicating the plaintiff. That is the statement need not refer to the plaintiff by name. it is immaterial that the defendant did not intend to defame the plaintiff. The question is whether the person to whom the statement was published could reasonably infer that the plaintiff was pointed out by the words used.

Un-intentional Defamation: Intention of the defendant is immaterial. The test is objective and not subjective. Acting in good faith and without, any intention to defame the plaintiff is no defence; but where the defamation is intentional, higher damages may be awarded. In several cases, proprietors of newspapers who not intended to defame the plaintiff have been held liable for defamatory publications, which had been understood as referring to the plaintiffs.

Sometimes statements intended to refer to a fictitious person may be in fact defamatory of an existing person. In **Hulton & Co Vs. Jones 1910** the plaintiff Mr. R. Artemus Jones, a practicing barrister in London, .used the defendants, the proprietors of the "Sunday Chronicle" for libel contained in fictional article written by one of their correspondents. In that article the writer gave a humorous account of a motor festival at Dieppe in which imputation was case on the morals of a fictitious person. Artemus Jones. The writer of the article did not know of the existence of the plaintiff by that name. The plaintiff barrister, sued the defendants for libel and friends of his gave evidence that they believed the article referred to him. The defendants were held liable.

It is in these circumstances that **Russel, L.J.** had remarked in **Cassidy Vs. Daily Mirror** the "liability in libel does not depend on the intention of the

defamer but on the fact of defamation," To mitigate the hardship caused by these decisions, the English Parliament passed the Defamation Act, 1952 which made a provision in Sec. 4 for offer of apology for innocent publishers.

In **T.V.Ramasubbier Vs. A.M. Ahamed Mohidden, (1972)** where the plaintiff complained that a news, item in defendant's newspaper about a person from Tirunelveli doing export business of Agarbathis to Ceylon, was stated to have been arrested for smuggling opium, had resulted in his defamation, it was held that the rule in **Hulton and V. Jones**, did not apply in India and the Indian courts would be guided by the rule of "Justice, equity and good conscience."

Defamation of class: In **Knupffer Vs. London Express News Papers Ltd, (1944)** the House of Lords considered the question whether an individual can sue in respect of words which are directed against a group, or body, or class of person generally. The law on this point as laid down by the House of Lords may be summarized as follows: (a) the crucial point is whether the words were published of the plaintiff in the sense that it can be pointed to personally the plaintiff, (b) normally when a class is defamatory no individual belonging to that class is entitled to say that defamed words were spoken or written of himself. As **Wills J** in said **Eastwoods Vs. Holmes (1858).** "If a man wrote all lawyers were thieves no particular lawyer would sue him unless there was something to point to the particular individual". But if the reference is to a limited class such as trustees, or members or firm, tenants of a particular building, to that words can be said to refer to each one, then all will be able to sue - **Mackey Southern Co's case (1959).**

Just an innuendo may mark out the plaintiff as one member of a class, so it can be shown that a description of a person, real or fictitious may point to the plaintiff. In **Anson Vs. Suart (1787)** newspaper paragraph reported, This diabolical character, like polyphemus is the man-eater as but one eye, an is well known to all persons acquainted with the name of a certain noble circumnavigator". It was very pain that the plaintiff was referred to as he has one eye and bore the name of Anson, the famous admiral.

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The words must be "maliciously" published : publication essential element of the civil law of defamation. Publication means the communication of the defamatory words to at least one person other than the person defamed. Communication to the plaintiff himself is not enough, for defamation is an injury to one's reputation and reputation consists in the estimation in which others hold him and not his own opinion of himself. Dictating a letter to one's typist is enough publication unless the occasion happens to be privileged. Sending an open postcard with defamatory statements in it is prima-facie publication. Similarly sending a telegram is publications to the telegraph clerk, unless it was in code or 'otherwise Unintelligible language.

Every repetition of defamatory words is a fresh publication and create fresh cause of action. A person has no right to give publicity to defamatory matter though it was originally spoken by the person defamed about himself. When in an after dinner speech humorous but disparaging words were after words published in a newspaper, the newspaper was held liable.

7.5. DEFENCES

The main defence of defamation are: (1) Justification by truth. (2) Fair and bonafide comment. (3) Privilege which may be either absolute or qualified.

Justification by Truth: In a civil action for defamation truth of the defamatory matter is a complete defence. The defendant will succeed if he shows that what he has spoken of the plaintiff is substantially true. The basis for the defence is set out in these words "For the law will not permit a man to recover damages in respect of an injury to character which he either does not, or ought not possess" This is so even though the defendant is shown to have been actuated by malicious and improper motives. On the other hand under civil law, merely proving that the statement was true of good defence.

Check Your Progress

4. State the defences available in a defamation suit.

Mere belief in the truth of the statement, however is no defence for a man attacks the reputation of another with his own pen even an innocent mistake can be of no help. A libel is so serious that may even cause a breach of the peace and therefore the saying is the greater the truth the greater the libel". So under exception to section 499, Indian Penal Code, or under the English Libel Act,

1943 the accused is required to prove not only that the statement complained of was true but also that it was made in public interest.

Whenever this plea of justification by truth is raised, it is not necessary to prove that statement is literally true but it is sufficient if it is true in substance, if the essence of the imputation is true and if the erroneous details in no way aggravate the character of the statement or its nature. Thus in **Alexander Vs. N. E. Railway (1865)** a statement that the plaintiff had been convicted of traveling in a train with out ticket and had been fined 1 £ with three weeks imprisonment in default of payment was held capable of being sufficiently justified by proof that he had been fined £ 1 for the offence with a fortnight's imprisonment in default of payment.

Fair comment: Comment means an expression of opinion on certain facts. It should be distinguished from making a statement of fact. Honest criticism has been recognized in every civilized system of law as indispensable to the efficient working of any public institution or office and salutary for private persons who interested themselves in public affair. So a fair and bona fide comment is a defence by itself whereas if it is a statement of fact. it can be excused only if justification or privilege is proved regarding that.

In justification by truth, the defendant must prove the truth of every defamatory fact; but under fair comment the defendant need prove only the fact on which the comment is based true and that the comment on these facts is true.

The requisites of fair comment are : (1) It must be an expression of opinion and not an assertion of fact. (2) The matter commented upon must be of public interest. (3) The comment must be fair.

Sometimes it is very difficult to draw a distinction between fact and comment. The borderline between comment and fact is shown to be very thin under certain circumstances. Thus in **Dakhlv Vs. Labouchere, (1908)** the plaintiff described himself as "a specialist for the treatments of deafness of the ear nose and throat diseases". The defendant described him as a "quack of the rankest species". Was this a comment or an allegation of fact? It was held by the House Lords that it was incapable of being interpreted as an expression of opinion and it might be comment.

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Fair comment on matter of public interest: Matters of public interest cover a wide range of subjects and individuals. The word 'public interest' must not be construed narrowly. The conduct of all civil and criminal action in Courts, decisions of judges, the evidence of witnesses can properly be commented upon when the trial is over. Matters of public interest include affairs of State, public act of ministers and officer of the state; public institutions and local authorities theatres, concerts and other public entertainments and other appeals to the public etc. But no one is entitled to invade the private life of an individual in order to discuss questions of character with which the public is not concerned.

Comments should be fair: For comment to be fair comment must not to mis-state facts; it must first of all be based upon true facts in existence when it was made. It is stated that one cannot invent untrue facts about a man and then comment upon them. It is very difficult to define precisely the nature fair comment. This can be illustrated by citing a few leading cases.

Cambell Vs. Spettiswoode (1863) the plaintiff who was a protestant dissenting minister and the editor of a newspaper published in it, letters on the subject of evangelizing the Chinese and gave a list of persons who had promised to buy the paper in order to promote propaganda. The defendant a printer of another newspaper published in it an article which, in a satirical vein. imputed to the plaintiff an attempt to make money out of a propagated charitable object and to deceive the public by false lists of subscribers. The defendant was held liable as there was no facts to warrant the imputations.

In **Subbaramiar Vs. Hitchock (1924),** the defendants published in the Hindu newspaper a report under the heading "Police-crimes in Ottapalam" on events which occurred during a students conference at that place in Malabar. The report charged the plaintiff, a superintendent of Police with having deliberately conspired with subordinate police-officers to assault innocent people, when as a matter of fact he was not proved to have been aware of that. The Madras High Court held the defendants liable on the ground that the facts is the case did not justify the reports which were deemed unfair and the defendant's belief of their truthfulness was held to be bad plea.

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A journalist has the right like any citizen to comment fairly and if necessary severally on matters of public interest provided there is absolute truth behind his comments. This is a recognized right and there is an obligation to have his facts right, it is the only way to serve public interest **Rustom K.Karanjia Vs. Krishnarai (72 Bom.L.R. 94).**

Rolled up plea - a plea that insofar as the words complained of consist of allegations of fact they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment made bona fide, is advanced as a defence. Such a plea is known as the rolled up plea. But to Salmond "It is a plea of fair comment only".

7.6. PRIVILEGES

The term 'privilege' is used in the sense of excuse or immunity conferred by law on statements or communication made on certain occasions called "privileged occasion". Law recognizes that certain occasions are so important that those making statements on such occasion are not liable in defamation, even though their statements are untrue or even malicious. Freedom of communication on such occasion, without fear of action for defamation is considered to be more important than the protection of a person's reputation. Absolute privilege is a complete answer to a suit for defamation in other words, the person defamed on an absolute privilege has no legal redress, however outrageous the untrue statement which has been made about him and however malicious the motive of the maker of it may be.

a) Absolute Privileges

Absolute privilege is recognized in the following cases :

1) Parliamentary Proceeding :

Art 105 (3) of our Constitution provides; statement by a member of either, House of Parliament cannot be questioned in a court of law. Under similar provision in Art 194 absolute privilege is conferred on statements by a member of the State Legislatures. This immunity extends not only to statements in the course

Check Your Progress

5. Write a note on Absolute Privilege.

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of legislative proceedings, but also to all reports, papers photos or proceedings published by or under the order of either house.

2) Judicial proceedings:

With regard to "Judicial proceedings". Neither party, witness, counsel, jury or judge can be put to answer civilly or criminally for words spoken in office. This immunity extends to all tribunals exercising functions similar to a court of justice.

3) Official communications or State Proceedings:

It must frequently be the duty of public servants to publish matters of a defamatory nature especially, in reports which in the ordinary course of affairs, it is necessary to furnish to head of departments and other superior officers. The privilege attached to such communications is absolute.

4) Military and naval proceedings :

All acts done in the honest exercise of military or naval authority, reports made in course of such duty statements whether false and malicious made in Courts Martial are absolutely privileged.

b) Qualified Privilege : In certain circumstances it is though, desirable that reflections on the reputation of another, although untrue, should not give rise to tortuous liability. There are three elements necessary to establish the defence of qualified privilege viz, (1) The occasion when the defamatory statement was made (2) the matter must have reference to the occasion: (3) it must be published with right and honest motive and without malice.

Qualified privilege is defeated if the plaintiff proves malice, i.e. evil motives. The ill-feelings between the parties, and their past and present conduct towards each other will be evidence of malice in the statement. Malice is present if the defendant does not believe in the truth of his statement or if he introduces extraneous matter in a communication or publishes the statement to a person outside the scope of the privilege.

Instances of qualified privilege :

Qualified privilege exesits in the following cases: 1) Report relating to matters of public interest: Fair and accurate report of proceeding in Parliament, in committees there of or proceedings before a court, proceedings of public meetings enjoy qualified privilege. Although the conduct of a private individual may be the subjects of such proceedings, his interest is considered to be subordinate to the public interest and so making known the matters of public importance and the general public interest more than counter balances the inconveniences to such private individual.

2) Statement made in discharge of a duty or protection of an interest. A privileged communication is made in the discharge of a duty, legal social or moral, or in pursuance of a right or for all these resons. It may be in the interest of the person to whom it is addressed or in the interest of a person making it or in common interest or in the public interest. Such duties may arise in the following cases.

Communication made by agent to his principal, answers to enquires about servants, traders, or customers, information of warning given by friend or relation to another to protect that other's interest. Information to police about crimes and complaint to superior authorities about misconduct of public officials. In **R.K.Karanji Vs. Thackarsey (1974)** in respect of an article published in an English weekly Blitz, containing defamatory allegations against the House of Thackersey, a business organization, the plaintiff brought an action against the editor of the Weekly, and others, for recovery of damages. The plea of qualified privilege put foreword was rejected by the High Court, on the ground, firstly, that the element of "duty" in communicating the statement did not exist. It was held that the mere fact that matter of general public interest would not justify publication of defamatory matter. Secondly, it was found that the article was published maliciously an not with and idea to serve public interest but with improper motive. Since on an earlier occasion the plaintiff had made the defendant editor apologise for publishing a defamatory article.

3) Fair and accurate reports : i) Extracts or abstracts from reports of Parliamentary proceedings ii) Reports of judicial proceedings such reports must

(Space for Hints) be distinguished from "comment". If they are mixed there is no privilege. iii) Fair reports of Parliamentary proceedings. Legitimate criticism of any matter of public interest is also protected iv) Reports of quasi judicial proceedings. v) Speeches made at the meeting of local or any other bodies are privileged.

The distinction between absolute privilege and qualified privilege is this, in the case of the former it is the occasion which is privilege and when once the nature of the occasion is shown it follows as a necessary inference that every communication on that occasion is protected. But in the case of the latter (qualified privilege) to claim the benefit of such privilege the defendant has to show how the occasion was used. Secondly, even after a case of qualified privilege has been established it may be met by the plaintiff proving, in reply actual malice, on the part of the defendant and on proof of such malice, the defendant will be disentitled to the benefit of qualified privilege.

GENERAL TOPICS

Defamation of deceased person :

It is not a tort to defame a deceased person. But criminal prosecution will lie if the statement would have amounted to defamation if he were alive if it is hurtful to the living relatives.

Defamation of a Corporation:

The reputation of a natural person differs from that of a corporation which is merely an artificial person. As such it cannot be accused of murder or immorality. But action can be taken if the statement , made affects its business or reputation.

Actions have been allowed where a trading company was alleged to consist of alien enemies in its directorate **(Lyons & Co. Vs. Lipton Ltd (1914)** or where a limited liability company was charged with carrying on an illegal business. In **South Hetton Coal Co. vs. North Eastern Association, (1894)** the plaintiff succeeded in getting damages in respect of statements charging it with failing to provide decent and sanitary accommodation for its work men and their families, for such statement would injure it in the way of its business.

7.7. DEFAMATION BY OR TO HUSBAND AND WIFE

As the common law maximum is that husband and wife are one in the eye of law, Communication of a defamatory matter concerning a third person by one spouse to another does not constitute publication. But where a third person says something defamatory of one spouse to the other spouse, then they are different person and action can be taken against the third person.

In law communication of defamatory matter by a husband to his wife or vice versa is not a publication, for what passes between them is protected on the ground that any other rule "might lead to disastrous results to social life". But communication by a third party to one spouse, a matter, defamatory of the other spouse is publication. Though the husband and wife are still one person in the eye of law, but not" for the purpose of having the honour and feelings of husband assailed and injured by acts done or communications made to the wife". If the butler is open a sealed cover addressed to his master there is no publication **(Hutt Vs. Hutt)**.

Liability of news-vendor : A news-vendor is not supposed to know the contents of the newspaper he vends, so ordinarily he will not be liable. But in order to attract customers if he shouts the libelous contents then he will be liable.

Apology : An apology for a defamatory statement may mitigate damages and its absence may aggravated them. But it cannot affect liability. Under Indian law of the plaintiff accepts the apology then the defendant can resist the suit of the plaintiff for damages.

7.8. SUMMARY

The essentials of the defamations are (i) the statements must be defamatory and (ii) referred to the plaintiff and (iii) the same should be published. In this unit we have discussed the scope of torts against the reputation of a person i.e. defamation. Defamation is classified into Libel and slander. All these topics have been explained with leading case laws. The defences available in an action for defamation are also elaborately dealt with.

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7.9. ANSWER TO CHECK YOUR PROGRESS

1. Refer 7.2
2. Refer 7.3
3. Refer 7.4
4. Refer 7.5
5. Refer 7.6

7.10. KEYWORDS

Libel	-	Flase statement that harms a person's reputation
Defamation	-	injuring the reputation of a person by words spoken or written
Equity	-	When existing laws would be **unfair** or inappropriate.

7.11. MODEL QUESTIONS

1. What is a defamatory statement? Discuss the various defences available to the defendant in an action for defamation.

2. The liability for libel does not depend on the intention of the defamer, but on the fact of defamation" – Discuss with case laws.

3. (a) Explain the meaning of "Innuendo" and its use in the law of defamation.

   (b) State the requistance of the defence of "Fair Comment" in an action for defamtion.

UNIT – 8

CONSPIRACY AND BUSINESS RELATED WRONGS

INTRODUCTION

It is tortious if a person, to knowingly and without lawful justification induce another person to make a breach of a subsisting contract, as a result of which that person suffers damage. It is one of the ways of committing the wrong by direct inducement. The defendant may do the same either by offering some temptation to one of the parties to make a breach of his contract, for e.g. offering higher remuneration to a servant than he is already receiving under a subsisting contract or by giving some threat of harm if the contract is kept alive eg. a threat of strike until the plaintiff is dismissed. We are going to discuss these aspects in detail in this unit.

UNIT OBJECTIVES

- To study the Conspiracy
- To understand the Economic torts
- To analyse the abuse of legal proceedings
- To know what is Malicious Prosecution
- To discuss about the Malicious bankruptcy proceedings.

UNIT STRUCTURE

8.1 Conspiracy - Essentials

8.2 Interference with freedom of contract

8.3 Fraud (or) Deceit

8.4 Passing off

8.5 Trade mark and patent right

8.6 Abuse of legal procedure

8.7 Malicious prosecution

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8.8 Malice

8.9 Malicious arrest

8.10 Summary

8.11 Answer to Check you progress

8.12 Key words

8.13 Model questions

8.1. CONSPIRACY

The tort of conspiracy was not well defined before 1942 the tort has been developed from the crime of conspiracy, which in the 15th Century in England was resorted to crush the evil of combination of persons to subvert legal process. Thereafter the common law courts formulated "conspiracy" as a tort on the pattern of the crime of "conspiracy" in connection with questions of interface with contracts and business relationship.

Essentials of the conspiracy

(1) combination of two or more persons with the object of willfully injuring another person (2) commission of the injury and (3) resulting in damage to other person. It is completed when such combination is for the purpose of willfully causing damage to the plaintiff and actual damages has resulted there from. Simply stated "a conspiracy consists in the agreement of or more to do an unlawful act, or do a lawful act by unlawful means". The gist of conspiracy is the combination of persons. The added element of combination may make unlawful an act which if done by one person alone, would not be so actionable. English common Law appears to have taken the view that there was always the danger that any combination might be oppressive and so general rule against injurious combinations might be desirable.

Check Your Progress

1. Explain the essential element of conspiracy.

Most of the cases of the tort of conspiracy have dealt with trade rivalry, although this tort is not limited to such cases. The starting point of this tort is the **Moghul cases in 1891**, in **Moghul Steamship Coy. Vs. Mc. Gregor Gow & Co., (1892)** the defendants a group of shipping companies associated together with England to secure a monopoly of the tea trade between China and view

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and keep up the rates of freight. With this object the defendants reduced the freight and gave liberal terms. This scheme had its desired effect of driving the plaintiff out of the tea market. The plaintiff filed the action against the defendant avoid gap for conspiracy together to monopolise the carrying of tea-trade with China, but it was dismissed on the ground that the combination was inspired by the lawful purpose of protecting the legitimate trade interests of their members.

Shortly thereafter the question of conspiracy came for consideration in **Allen Vs. Flood (1898)**. The facts in this case were Flood and Taylor were employed by Glangall iron Company to do a job by the day. There were others who were members of a trade union employed by Glangall Iron Company. Allen, a trade union official (defendant in this case) told the employer that members of the union would stop work or be called out on strike, unless Flood and Taylor were discharged from the job. Flood and Taylor were thereupon lawfully dismissed. Flood sued Allen for damage. The House of Lords held no theft or unlawful act had been committed by Allen; he had not induced or procured the breach of any contract nor had he entered into any conspiracy. The fact that his motives might have been maliciously made makes no difference.

The next case in the development of the law of conspiracy is **Quine Vs. Leathem (1901)**. The plaintiff Leathem, was a butcher who had a good customer by name Munce, to whom he was in the habit of selling 70 pound worth of meat every week. The defendants five trade union officials, demanded of the plaintiff that he should discharge certain non union men employed by him. He refused. The defendants then induced Munce to stop all dealings with the plaintiff threatening to call of workmen from Munce in case of non compliance. So Munce stopped his dealings with the plaintiff. The plaintiff brought an action against the trade union officials for damages. It was found that defendants had maliciously conspired to induce the plaintiffs customer Munce to cease dealings with him and so the plaintiff was awarded damages.

In the above case there was no evidence of any personal vindictiveness and their action has directly connected with the attainment of a legitimate object of union that of the combination in the Moghul case. This decision was thought to

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be a hindrance in the development of Trade Union activities. So the effect of this decision was almost immediately neutralized by the Trade Disputes Act 1906, which provided that conduct by two should only be actionable if it would have been wrongful.

The law relating to conspiracy was completely restated by the House of Lords in 1942, in the light of modern industrial condition in **Crofter Hindwoven Horris Tweed Co Vs. Veitch (1942)**. The facts of this case were; the production of Harris Tweed an industry of the island of Lewis situated in the north west of Scotland. Originally the yarn of the cloth was handwoven from all by the Crofts Lewis in Scotland and was wholly produced in the Island. The hand spinning of the wool declined very much by 1930 and so thereafter the weavers in the Scotland and was wholly produced in the Island, nevertheless spun yarn woven by the native crafters. This mill owners complained that cloth woven in Lewis out of the imported yarn could be sold much more cheaply than cloth made from yarn Spun in Lewis. They therefore insisted were member of on getting a minimum price fixed securing that to the cloth. Of the workers in their mills 90% trade union **T**. The trade union **T**, with the object of an worker should be members of the union and of increasing their wages approached the mill owners replied that they could not do this on account of the competition form the imported yarn. The union officials, Veitch and another instructed the lewis workers not to handle the imported yarn or to export the cloth made from it. They obeyed (without breaking any contract) and thus injured the trade of the mill owners who used imported yarn. The affected mill owners sued the union officials for conspiracy.

The House of Lords held that even if there was combination between the defendants and the mill owners, the plaintiff had no cause of action since the predominant purpose of the combination was the legitimate promotion of the interests of the persons coimbining. Thus the, Crofter case in effect reversed the decision in **Quine Vs. Leathem**.

The Crofter cases formulated two proposition of Law, namely

1) A combination of two or more persons wil-fully to injure a man in his trade is unlawful and if it results in damage to him is actionable.

2) If the real purpose of the combination is not to injure but to promote or defend the trade of those who enter into it, then no wrong is committed and no action will lie although damage to another ensues.

It may be reiterated that to make out the tort of conspiracy there must be not only combination (concerted action between two or more persons) but damage must have resulted from such action. Conspiracy is both a tort and crime. Criminal conspiracy is defined in section 120 A of the Indian Penal Code. It is different from conspiracy as a tort. Under Criminal Law an agreement between the parties to do illegal act or a legal act by illegal means is actionable. It is not necessary that the conspirators must have acted in pursuance of their agreement between the parties, but it is complete only when actual damage results to the plaintiff.

8.2. INTERFERENCE WITH FREEDOM OF CONTRACT

Intentionally and without lawful justification to induce one person to break his contract so to as cause damage to the other contracting party is a tort. This was so decided in **Lumley vs. Gye (1853).** In this case, one Johanna Wanger a famous opera Singer was under contract to sing for the defendant paid her a large sum of money to her to break contract with the plaintiff and to sing for defendant. The defendant was held liable.

The essentials of the tort have been considered in a number of modern cases. It must be established that A had brought about a breach of the contract between B and C, the casual connection between A's conduct and the breach require strict proof. In **Allen Vs. Flood (1898)** the plaintiffs shipwrights engaged G.I. Co, to work on a ship from day to day. The defendant Allen, an official of the trade union of iron workers who were engaged on the same ship informed the G.I. Co. that the company should dismiss the plaintiffs who were non-union men. The company terminated the services of the plaintiffs. On the question whether the defendants had maliciously caused injury to the plaintiffs by inducing the employers to do something which it was lawful for the employers to do or not to enter into a further contract with the plaintiffs, it was held that no action lay,

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merely induce another not to enter into a contract is not in itself an actionable wrong, though the motive be malicious.

2. The plaintiff, must prove that he suffered damage as a result of the breach of contract which had been procured.

3. A the wrongdoer must have had knowledge of the contract between B and C; but extent of such knowledge will vary from case to case. In **Emerald construction Co. Ltd. Vs. Lowthin (1968) I.W.L.R 691** and **Daily Mirror News paper Ltd. Vs. Gardener (1968) 2Q B 762,** the defendants had knowledge of a contract between the plaintiffs and their co-contractors but they did not know its precise terms and assumed that it could be terminated at short notice. But the defendant were determined to bring the contractual relationship to an end whether it was done in breach or not. The Court of Appeal held that was sufficient for the plaintiffs to be entitled to an injunction.

4. The means adopted to bring about the breach, may be by direct personal persuasion or indirect procurement.

Direct Inducement or Intervention:

The most obvious form of direct inducement is active persuasion or enticement of the contracting party. **Lumley Vs. Gye** exemplifies this. This is further illustrated by the case of **G.W.K. Ltd., Vs. Dunlop Rubber Co. Ltd., (1826).** B should be fitted with tyres of C's secretly removed cars tyres made by C and substituted tyres of his own manufacture. A was held liable to B for trespass of his good and to C for unlawful interference with his contract with B.

Indirect Procurement:

This occurs when the dependent induces a third party for example, a servant of one of the contracting parties to do an act which in itself is wrongful (such as contracting a breach of contract of service) so as to prevent performance of the main contract.

In **J. T. Stratford & Son. Vs. Lindley (1965),** Mr.Stratford was Chairman of both the plaintiff company and another company. B refused to

recognize trade union of which the defendants were officials. The plaintiff company repaired barges and let barges on hire, in both cases, under contracts. The defendants instructed their members, who induced most of the watermen of London not to handle the plaintiff's barges, especially after the barges were left at far away places and the plaintiff suffered financial loss .

In the suit by the plaintiff against the trade union officers the court held the defendants liable and their knowledge of interference with the plaintiff's contract could reasonably inferred and so granted injunction against them.

The distinction between the tort being committed by direct interference and by indirect procurement is this; where direct interference is concerned, the use of unlawful mean's is not required, in these cases the act must be wrongful in itself, liability can be incurred. But in cases of indirect procurement, the means employed must be proved to be unlawful.

Liabilities imposed by judgments in such action was considered to impede the growth of trade unions. So, to give protection against certain liabilities described above in respect of acts done in contemplation of trade disputes, enactment of a statute was felt necessary. In India, the **Trade Union Act 1926** which is modeled upon the **Trade Disputes Act, 1906** of England has been enacted to give such protection. It is provided under sec -18 (1) of the Indian Act that no suit or other legal proceeding shall be maintainable against any registered trade union or any officer or member thereof in respect of any act done in contemplation or furtherance of a trade dispute, to which a member of the trade union is a party on the ground only that such act induces some other person to break a contract of employment of that it is an interference of his trade, business or employment of some other persons to dispose of his capital or of his labour as he wish.

"Trade Dispute" means any dispute between employers and workmen or between workmen and workmen or between employers and employers which is connected with the employment or non employment or the terms of employment or conditions of labour of any person. Therefore, the furtherance of a trade dispute is a justification of a trade union or its officer bringing about breach of employment contract.

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Intimidation: Intimidation is now an established tort. It is committed when a person say A, holds a threat to B, that he will commit an act or use means unlawfully as against B as a result of which B does or refrains from doing some act; which he is entitled to do thereby causing damage either to himself or to another C. The essence of the tort is the use of unlawful threat.

Rookes Vs. Barnard (1964) is a leading case on this subject. The facts of the case are: The plaintiff an employee of British Overseas Airways Corporation (B.O.A.C) resigned from his trade union. That trade union had an agreement with B.O.A'C. that all employees at that place of work should be union members. As the plaintiff refused to rejoin the trade union, all the members of the union passed resolution and intimated to B.O.A'C that a strike of all the employees would take place within three days if the plaintiff non-unionist was not removed. In consequence, B.O.A'C. suspended and later dismissed this plaintiff. By an agreement between the union and B.O.A'C. it was agreed that employees would not participate strike. The plaintiff did not have any remedy against the B.O.A'C. on whose part there was neither any breach of contract nor commission of a tort. He brought an action against the defendants, the union officials, for wrongfully inducing B.O.A'C to terminate his services. The House of Lords held that threat to withdraw labour if plaintiff's services were not terminated constituted a tort of intimidation and as the plaintiff has suffered thereby he was entitled to succeed in his action.

It must be noted that a threat would amount to intimidation only if the threat is to do an act or to compel a person to do something to his own detriment or to somebody else. This distinction is borne out by the decision in **Venkata Surya Rao Vs. Nandipai, Muthappa (1964).** In this case a well to do agriculturist failed to pay arrears of land revenue. The Village Munisif threatened to distrain the earnings worn by him if no other movable property was readily available. The village goldsmith was also called, but on his arrival, the arrears of land revenue was paid. It was held that since the threat was not do something unlawful and had not compelled the plaintiff to do something to his detriment, there was no intimidation.

8.3. FRAUD OR DECEIT

The tort of deceit was first recognised in **Pasley Vs. Freeman (1790).** It was laid down in that case that in order to constitute the tort of deceit certain elements should be present (1) there must be a false representation of facts (2) the representation must be made with full knowledge of its falsehood; (3) the false representation was made with the intention that it must be acted on by the plaintiff (4) such action caused damage to the plaintiff; and (5) the plaintiff must prove that he did act upon the representation and did suffer damage.

False representation : There must be an active attempt to deceive by a statement, which is knowingly false in fact and fraudulent in intent. Though ordinarily non-disclosure is not fraudulent yet under exceptional cases it may be fraudulent instance, where there is a duty to disclose active concealment will amount to fraud where dangerous things are concerned and where there is a fiduciary relationship.

Knowledge: Here recklessness whether the fact was true or not is sufficient. Where there is a false statement of facts honestly thinking it is true as in the case, **Derry vs. Peek,** he is not liable.

Plaintiff should have acted upon it : Unless the plaintiff acted upon the representation there cannot be a tort of deceit.

Damage : Where there is only element but not the other elements, there is no action. In **Ward Vs. Hobbs (1857)** the defendant sent to the market pigs suffering from contagious disease. He knew of the malady but, they were put to sale on the condition that no warranty would be given and compensation for defects. The plaintiff bought them, and put them among other pigs which were contraindicated and died. It was held, the defendant was not liable as he had not represented that the pigs were free from disease.

In **Dinion V. Great Northern Rly (1855).** It was announced in a current time table a certain train was running while that particular train had been discontinued. It was held that the defendant was liable to the plaintiff who had relied on the misrepresentation of the Rly, Co, and missed an appointment which caused him loss.

Check Your Progress
2. Deceit – Explain.

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George Vs. Skivington (1869) L.R. Ex.1 (Injurious hairwash case) A hair-wash was purchased by the husband and his wife's hair was literally. washed away, held the defendant manufacturer was liable.

Slander of Title (Injurious Falsehood) : The phrase "slander of title" was formerly used to refer to disparagement of a person's title to real property. Now-a-days, the phrase takes in disparagement to property movable or immovable, corporal or incorporeal. For example, if property of any kind is for sale, and any one without lawful motive, comes forward and falsely states that any encumbrance, the right or capacity of the vendor to make out a good title and in consequence the bargain goes off, an action lies for tort of slander of title. The leading case of **Ratcliffe Vs. Evans (1892)** is an instance of false representation about business. The defendant was held liable for publishing in his newspaper a false statement that the plaintiff had ceased to carry on his business and that his firm did not then exist, and thereby causing loss of customers to the plaintiff.

Essential ingredients : (1) Falsity (2) Malice and (3) Actual damage According to Winfield "This is a false and malicious statement about a person, his property or business which damages not necessarily his personal reputation but his title to property or his business or generally his material interest. Salmond calls it as injurious falsehood.

Standard of goods: The phrase, "Standard of goods" is used when the disparagement relates to goods or merchandise. It is actionable if a person falsely and maliciously disparages a man's goods and thereby prevents their sale.

The points to be proved in action for slander of title or of goods are;
1. Making a false statement to some person other than the plaintiff. This is known as publication of the false statement.

2. That the said publication disparaged the plaintiff's property or business, if it disparaged also his reputation directly or indirectly then an action for defamation will also lie.

The statement by one trader that has own goods are superior to those of another (mere puffing) even it is false, malicious or cause damage to that other is not actionable. In **White Vs. Mellin (1895)** the defendant, chemist was held not

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liable for a statement, contained in wrappers affixed by him to the plaintiff bottles of Mellin's food which the defendant sold in his premises, that the public were recommended to buy the defendant's (Dr. Wance's) food for infants that "it was more healthy and nutritious than any preparations yet offered".

3. **Damage:** That the said publication caused special damage as a natural consequence, of the loss of business, customers, income or profits or cost for being compelled to defend his title.

4. **Malice:** That the statement was published maliciously i.e., out of some motive which was not bonafide or under claim of right. In fraud, false representation is directly made to the plaintiff, in injurious falsehood, false statement about the plaintiff is made to third party.

8.4. PASSING OFF:

In passing off, one trader represents his good, or it may be his services as those another. That is A sells his sub-standard goods as that of the plaintiffs quality goods. Even if he does it innocently without any intention to device he commits the tort of passing off. All that is necessary is that he get up, the label, the description are such that they are easily mistaken for that of another. Actual confusion on the part of a member of the purchasing public need not be proved but proof that confusion has occurred will promote the plaintiffs case.

The appearance of the plaintiffs goods or selling them under the same or a similar name is the commonest from of the tort. In **Hudson & Co, Std. vs. Asian Organisations Ltd., (1964)** medicated cough sweet were sold in Singapore since 1953 in red cellophane wrappers bearing the word "Hocks". In 1958 the defendants, began selling in Singapore their cough sweets in the same kind of wrappers 'but' bearing the word "Pector" it happened that many of the Singaporeans were unable to read English and between 1953 and 1958 only then plaintiff cough sweet being sold in red wrappers that public were in the habit of asking for "red paper cough sweets". The Privy Council did not hesitate to grant injunction restraining the defendant from offering their Pector cough sweets in red wrappers. In **Offmenlaeoche & co & G. Vs. D.D.S.A Pharmaceuticals Ltd.**

Check Your Progress

3. Passing – off.

(Space for Hints) 1972) it was held even though there is no infringement of trade mark the get-up will alone do for the tort.

8.5. TRADE-MARK AND PATENT RIGHT :

A trade-mark denotes that the goods are the manufacture or merchandise of a particular person. If the plaintiffs case is based on similarity or identity of name, then he must show that the name actually denotes goods manufactured by him and that is not a mere description of goods. The term "mark" includes any device, brand, liable ticket, name signature, word, letter numerical or any combination thereof. So similarity between the mark of the plaintiff and the defendant, which misleads the public in thinking that the latter is the mike of the former; or is likely to deceive the public, then alone the plaintiff is entitled to an injunction. The test is the impression likely to be produced on the casual customers. Actual physical resemblance is not necessary, but one of the designs as an obvious imitation will suffice, even of the false trade mark is used innocently or unwillingly there is liability. The leading case on this is Redaway **Vs. Banham (1896)** where camel hair belting, which was descriptive in the beginning had eventually come to signify belting made by the plaintiff is heavy is trying to convenience the Court that a word in common use has become associated with his goods in **Bollinger Vs. Castro Brave Wine Co. (1960)** where the plaintiffs "Champagne" meant wine produced in the Champagne district of France was infringed by the defendant's calling one of their wines as Spanish Champagne", an injunction lay for such tort.

Trade name: A person can freely use his own name or one which he has acquired by reputation, although its use may inflict damage on someone else who has the same name. unauthorized use of another's name will be unlawful. In **Parker Knoll Ltd Vs. Knall International Ltd. (1962)** both parties were furniture manufacturers the plaintiff an English company and the defendant an American company which had recently began to trade in England. It was a fact that defendant had uses only his own name, but nevertheless the House of Lords granted the plaintiff an injunction from continuing to do so without distinguishing its goods, from that of the plaintiff.

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Patent right: A first inventor of any new manufacture or invention is given his right by the State by way of protection under **Patents and Designs Act** of England. India protects a new invention under, the Act a period is fixed during which the Patentee has exclusive rights of use and enjoyment of the right.

Copyright: The Copyright Act gives the Author or the person who has the copyright acquired or books, letters, dramatic and musical A and works art, he has right of exclusive use and enjoyment. A very small degree of origination for he has right to be vested. There should not be anything in it which is obscene irreligious and libelous.

Remedies for passing-off: 1) Injunction, 2) damages or 3) an account for profits, at the option of the plaintiff.

8.6. ABUSE OF LEGAL PROCEDURE

Harassment of an individual by legal proceeding improperly instituted against him is actionable as a tort. If there is no basis for such legal proceedings, no doubt they will not ultimately succeed but during their pendency, they may cause great injury to the person subjected to them. It is the right of everyone to set the law in motion if he does so with a view to protect his own or public interest, but it is an abuse of the right to proceed maliciously and to pervert the machinery of justice, on the off-chance of succeeding and thereby to cause damage to another.

In India, there is comparatively large body of cases – law on this branch. This would suggest that the evil in this respect is prevalent to a considerable extent in our country. The chief classes of legal Proceeding, for abuse of which, actions may be brought are:

(1) Malicious criminal prosecution.

(2) Malicious arrest

(3) Malicious bankruptcy (insolvency) proceedings.

(4) Malicious liquidation proceedings.

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(5) Malicious execution against property.

(6) Malicious house-search.

8.7. MALICIOUS PROSECUTION:

This tort is committed by the malicious institution of criminal proceedings against a person. The development of this tort was gradual since the problem has been to balance between two competing principles, the social need to protect a just accuser from any fear of being proceeded against for this tort and the necessity of discouraging false accusations against innocent person. Any how, judicial concern to safeguard against improper actions being laid for malicious prosecution has led to the imposition of protective restrictions and other limitations to such an extent that it can be safely said that no honest prosecutor is likely to be deterred by it from aiding law in its enforcement.

One of the main requirements of this tort of malicious prosecution is that the proceeding must have tended to cause damage to the plaintiff. The leading authority on this aspect is **Saville Vs. Roberts (1968)**. Therein Holt C.J. classified damage for the purpose of this, tort as of three kinds. "First damage to a man's fame as if the matter where of he is accused be scandalous; second damage to persons as where a man is put in danger to lose his life or, limb or liberty and third damage to his property as where he is forced to expend his money in necessary charges to acquit himself of the crime of which he is charged". Anyone of the three kinds of damage is sufficient to justify the action for malicious prosecution.

Damage is the essential of the action. **In R.K. Soni Vd. Singhara Singh (A.I.R. 1992 Delhi 264)** count said that damages would first represent the general damages for the injured, Feelings and reputation. In respect of certain proceeding against a person, law presumes that damage had been suffered and does not require proof of actual damage. For instance, in the case of a prosecution for a crime which involves moral stigma or damage to reputation is presumed and need not be proved. If the crime is punishable by imprisonment or loss of life. The second element of damage is also present. The third element is established by proof of expenses incurred in the conduct of defence.

Check Your Progress

4. Essentials of malicious Criminal Prosecution..

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If the prosecution is for an offence, which is for breach of some duty under a statute or regulation for involving moral turpitude, e.g., prosecution under **Municipal Act** for non-compliance with a notice to abate a nuisance on a person's premises (if no expense had been incurred in defending the proceeding) no action for malicious prosecution would lie.

To succeed in an action of malicious Prosecution the following elements of that tort must be established. 1. That the plaintiff was prosecuted by the defendant. 2. That the prosecution ended in the plaintiff's favour, 3. That the defendant acted without reasonable and probable cause. 4. That defendant was actuated by malice i.e. some purpose other than that of carrying the law into effect. We can study these elements one by one.

Prosecution of plaintiff by the defendant: The word prosecution means a proceeding in a court of law charging a person with a crime. In India, it includes a proceeding before a Magistrate under the preventive sections of the Criminal Procedure. Code for compelling a person to give security for keeping the peace or good behaviour.

What then is prosecution? When does it commence? To prosecute to set the law in motion and the law is set in motion by an appeal, to some person clothed with judicial authority in regard to the matter in question. There was a difference of opinion, amongst the court in India, as to whether a prosecution can be said to have been commenced, for purposes of this tort, when a complaint is laid before the police but no action had been taken against the plaintiff by the – Magistrate on foot of the complaint. This has been settled by Privy Council in **Mohammed Amin Vs. Jogendra Kumar Bannerjee A.I.R. 1947.** The facts of this case as are: The defendant has filed a complaint before a Magistrate charging the plaintiff with cheating. The Magistrate thereupon examined the complainant on oath and made an enquiry under Sec. 202 Cr. P.C, (old code). Notice of enquiry was issued to plaintiff who thereupon engaged counsel, attended the enquiry and thus incurred expenses. The complaint was finally dismissed under Sec. 203 Cr. P.C. In these circumstances, the Privy Council held that there was a prosecution. They laid down the test is not whether the criminal proceedings have reached a stage at which they may be described as a

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prosecution; the teat is whether such proceeding have reached a stage at which damage to the Plaintiff results". As the plaintiff had made out his case against the defendant, he was awarded damages of Rs. 1000/- for expenses incurred and Rs. 100/- as general damages.

In India it has been held that there is no commencement of prosecution before the person charged is summoned before the judicial officer (Magistrate) to answers the charges. This is illustrated by the decision in **Bolandanda Pammaya Vs. Ayaradaia A.I.R. 1966 - Mysore** the facts of which are; The defendant laid a complaint, before the police accusing the plaintiff of theft of cardamum and fish traps. The Sub-Inspector examined both the plaintiff and defendant and made a search of the plaintiff's house. He then referred the defendants complaints as false. Thereupon, the plaintiff filed a suit against the defendant claiming damages for malicious prosecution. The action was held not maintainable on the ground that mere filing of complaint before the police, when no judicial authority was set in motion in pursuance of it would not amount to prosecution.

To be liable for the consequences of the proceedings complained by the plaintiff, it must be shown that they were prosecuted by the defendant. Certainly it is not necessary that the defendant should himself conduct the prosecution; it is sufficient if he was actively instrumental in the prosecution of the plaintiff. In India, prosecution is not private and so, it has been pointed out by the Privy Council that "giving information to the authorities which actually leads to prosecution is just the same thing. And if that is done and trouble caused an action will lie."

A person cannot be deemed to be prosecutor merely because he has given information of some offence to the police. in consequence of which the plaintiff was prosecuted. To illustrate, if A lodges a complaint before the police: narrating true facts and expressing his honest suspicion about the plaintiff's involvement leaving it to the police to decide whether to proceed against the plaintiff or not he is not a prosecutor. The conduct of the defendant before and after lodging the complaint, which resulted in the prosecution of the plaintiff will indicate whether he is the. prosecutor or not.

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In **Gayaprasad Vs. Bhaget Singh** the Privy Council pointed out if therefore, a complaint does not go beyond giving what he believes to be correct information to the Police and the police without further interference on his part (except giving such honest assistance as they may require), think fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But if the charges is false to the knowledge of the complainant, if he misleads the police by bringing suborned witness to support if he influences the police to assist him in sending an innocent man for trial before the Magistrate it would be equally improper to' allow him to escape liability because the prosecution has not technically been conducted by him. The question in all cases of this kind must be who was the prosecutor? and the answer must depend upon the whole circumstance of the case.

That the prosecution ended in the plaintiffs favour : The plaintiff must show that the prosecution ended in his favour. So, long as it is pending he has no right to sue.

Absence of reasonable and probable cause: Reasonable and probable cause is a technical phrase in the context and means whether the defendant believed in the plaintiff's guilt and if his belief was reasonable in the circumstances. In **Hicks Vs. Falkner, (1878)** Hawkins J. defined "reasonable and probable cause" as "an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead any ordinary, prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed." This definition has been approved and followed in later cases.

In the leading case of **Abrath Vs. N.E. Rly. Co** the defendant a Railway company from whom a passenger had recovered compensation for physical injuries alleged to have been sustained in a railway accident, came to know subsequently that the injuries on the passenger were not due to the collision but the symptoms of those injuries had been artificially created by Dr. Abrath, and by practicing, fraud on them compensation had been recovered. The Railway Company consulted their lawyers and on their advice prosecuted the plaintiff for

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conspiracy to defraud them. He was however, acquitted. In these circumstances Dr. Abrath brought an action for malicious prosecution against the railway company. The court found that the railway company had taken reasonable care to inform themselves of the true facts and they honestly believed in their allegations and so not liable.

This branch of law is unusual in that the plaintiff is required to prove a negative viz., that the prosecutor did not have reasonable and probable cause. Where knowingly false allegations are made, want of reasonable and probable cause is clearly established.

8.8. MALICE

The term malice in this form of action does not mean spite or hatred against an individual but denotes that the party is actuated by improper and indirect motives. This elements has also to be established by the plaintiff.

Malice may be proved by previous strained feelings, unreasonable or improper conduct like advertising the charge or getting false evidence. In **Abubucker Ebrahim and another Vs. Maganlal K. Javerys (1940)** two persons M and S purchased oil from A, promising to pay the price in three days but failed to do so. Amade enquiries and honestly believing that M and S had played fraud laid a complaint before the Police against them. M and S were prosecuted for offences under sections 415 and 420 of I.P.C. but they were ultimately discharged. M and S thereupon filed a suit against A for malicious prosecution. The Court held that A honestly believed that a fraud had been committed and that M and S had failed to prove malice and so, the action should fail.

8.9. MALICIOUS ARREST

Check Your Progress

5. What is meant by Malicious Arrest.

No action will lie against any persons for securing the arrest of another by way of execution or otherwise, pursuant to a valid judgment even though such arrest is erroneous and it is set aside by a higher court. If however, on some false charge or statement or by misleading the judge, the plaintiff was arrested under a judges order, a plaintiff can sue for malicious arrest. If must be proved

that the arrest was procured maliciously and without reasonable and probable cause.

Malicious bankruptcy proceedings or liquidation proceedings:

Proceedings for adjudging a person as a bankrupt or for winding up trading company if maliciously instituted without reasonable and a probable cause are actionable. Such proceedings effect a man's fair name and must necessarily cause great injury to his credit, when it becomes to know that such proceedings, had been instituted against him. Hence it is, such proceedings, though civil in nature, furnish a cause of action for this tort.

Maintenance and Champerty:

Maintenance means improperly stirring up litigation by giving to one party to bring or defend a claim without just cause or excuse. The person who intermeddles with litigation in this manner has really no concern with it, but does so by way of gambling in litigation. Champerty is a particular form of maintenance in which the person maintaining the litigation is to get a reward out of its proceeds. In England by the **Criminal Law Act, 1967,** the tort of maintenance and champerty has been abolished.

In India, it is not every agreement to supply funds for a suit in return for a share of the property that can be regarded as gambling in our country. Agreement stipulating for a transfer of property involved in litigation have often been enforced, in this circumstances, though an action for the tort of maintenance and champerty can lie on grounds similar to those for malicious abuse of process (plaintiff's success in the previous suit for want of reasonable and probable cause on the part of the defendant in maintaining that suit and malice) there is only restricted scope for this action for this tort .

All cases of champerty are also causes of maintenance, but the converse is not true. The person maintaining the suit, acts through spite. Malice is of the essence of the action. The presumption is of official assistance; unless it is proved that,

(1) they had a common interest in the action e.g. master and servant or vice versa

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(2) that he was impelled by a motive of charity bonafide believing that the person maintained was poor and was harassed by a rich person or showing sympathy.

8.10. SUMMARY

The civil wrong differs from the crime of conspiracy in that damage is essential in a Civil action. While the mere agreement is regarded as a public danger and made a perishable offence. The damage in this class of actions is wholly loss of employment, business or trade but may take another forms. The writ of deceit was in origin. The tort known as deceit in the modern law comprehends any false representation made by one person with intent to deceive another and resulting in damage to the latter. We discuss about the conspiracy and various economic torts affecting good name in business, and abuse of legal proceedings, finally that wrongs affecting the reputation of the person and cause damage to the plaintiff's property.

8.11. ANSWER TO CHECK YOUR PROGRESS

1. Refer 8.1
2. Refer 8.3
3. Refer 8.4
4. Refer 8.7
5. Refer 8.9

8.12. KEYWORDS

Conspiracy	-	a secret plan by a group to do something unlawful or harmful
Procurement	-	obtain something
Intimidation	-	frighten to do something
Liquidation	-	wind up the affairs

8.13. MODEL QUESTIONS

1. What is conspiracy? Conspiracy is a separate Tort – Discuss.
2. Examine – Various Kinds of abuse of legal proceedings.
3. Discuss – Malicious Prosecution and its ingredients.

UNIT – 9

DISCHARGE OF TORTS AND REMEDIES

INTRODUCTION

Once a tort is committed, a vested right of action springs in favour of the injured person. This vested right of action will come to an end by any one of the method discussed in this unit. In this unit we shall also consider the remedies which are available to the victim of a tort. Of these most important is an award of damage Remedies available for the damage is classified in two types - (i) Judicial (ii) Extra-Judicial.

UNIT OBJECTIVES

- To study the Miscellaneous and doubtful Torts
- To understand the scope of discharge under the law of torts
- To observe the various remedies available under law of torts

UNIT STRUCTURE

9.1. Miscellaneous and doubtful torts.

9.2. Discharge of torts

9.3. Remedies

9.4. Summary

9.5. Answer to check your progress

9.6. Keywords

9.7. Model Questions

9.1. MISCELLANEOUS AND DOUBTFUL TORTS

Invasion of privacy: Certain wrongs are struggling for recognition in this branch of law. Some of these wrongs have received recognition in the United States as creating liability for torts, but English Courts have been reluctant

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to accept them as giving rise to tortious liability. The injury to the right of privacy is one such wrong which has not received explicit recognition in English Courts; but it is different in U.S.A. it is interest to us by way of showing the new developments in social opinion and sentiments giving rise to new needs and the response of courts in meeting them. The law of torts is not a static body of rules and so, in modern conditions, right of privacy needs protection, and a new head liability for invasion of that right has to be recognized.

Right to privacy may be described as the right of a person to seclusion of himself, his family or his property from the public. We can consider this right by dividing it into (1) Privacy of property and (2) Personal privacy.

Privacy of property in the sense of protection against intrusion by others is protected by law. Thus the infringement of Copy right, Patents, trade names etc. are protected by special statutes like the Trade and Merchandise Marks Act, the Patents and Designs Act or by some independent statute or by general law as the tort of passing off. Such infringement to be actionable, must be brought under one or other of the recognized torts like like Trespass, Nuisance, Breach of copyright or infringement of patents or trade marks. But in England for one form of infringement there is no redress. A land owner cannot be prevented from opening windows, which command a view of his neighbour's premises. In a case **Kruse Vs. Johnson (1898)** where a doctor sued the defendant his neighbour for arranging certain mirrors in such a way as to reflect fully what was going on in the doctor's consulting room. The court refused to recognize the doctor's right saying that English law knew no such right and it was for the plaintiff to take effective measure from intrusive observers.

On the other hand, in India, in view of our custom of observing 'purdah' by some section of people right to privacy has been recognized. In **Gokul Prasad Vs. Radha,** the right of privacy of a part of a house, used as zenena was recognized. In this case an injunction was granted restraining the defendants from constructing building over-looking the zenena of the plaintiff.

Check Your Progress

1. Doubtful Tort.

Personal privacy in the sense of being left alone i.e. to maintain one's intellectual and emotional personality free from offensive instruction by conduct

of others leading to annoyance and emotional distress is not afforded protection in England. A common form of such misconduct invading privacy in this sense is the unauthorized publication of one's name, likeness or private affairs by photographers, press men or speculative advertisers. In this context the case reported in **Corelli Vs. Wall (1906)** is instructive. The defendant published and sold without the consent of plaintiff a novelist colored picture cards depicting bad portraits of her in imaginary incidents of her life. She sought an injunction against such publications. It was refused, inter alia on the ground that there was no authority for the proposition that "a private person was entitled to restrain the Publication of herself which had been made without her authority and which although professing to her portrait, was totally unlike her". But it is to be pointed out that publication of a person's portrait or caricature may be defamatory, though it may not be a wrong as infringing personal privacy.

On the other hand, in U.S.A. protection is afforded against such invasion. In a California case, a woman had a disreputable past life, but having given it up, married and was settled in life. Seven years later the defendant, without her permission, released a film portraying the true story of the plaintiff's life as gathered from the court records, advertising it as such and using the plaintiff's maiden name. It was held that plaintiff could sue for a violation of her right of privacy.

Another wrong of which recognition as a tort is yet to be given is the wrong of breach of confidence. Breach of confidence consists in the unauthorized use of information given in confidence to another. If breach of confidence is recognized as a tort, the mental element required for liability should be made clear. Possibly an injunction may lie against a person who comes into possession of information with knowledge of its confidentiality, but there is some doubt as to the position where the plaintiff seeks damages. The matter is still under consideration in England.

9.2. DISCHARGE OF TORTS

Once a tort is committed, a vested right of action springs in favour of the injured person. This vested right of action will come to end by any of the following methods;

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1. By the death of one of the parties;
2. By judgment recovered;
3. By limitation;
4. By 'waiver;
5. By accord and satisfaction;
6. By release.

The effect of the methods indicated above is to extinguish liability for the tort. Such extinction of liability is known as "discharge of the tort" concerned. Some of the methods mentioned above are, viz., waiver accord and satisfaction and release, cause extinction by act of the parties concerned in the tort, while the other methods, death of one of the parties, by recovery of judgment and limitation cause extinction by operation of law. Let us now examine in some detail each one of these methods.

9.2.1. Death of one of the parties:

Death as a method of extinction of liability has been considered already in an earlier lesson. In the present context we may refer to effect of death on the rights and liabilities of the parties. Under the English, law the general rule prior to 1934; was that death of either party put an end to the cause of action in tort, by one against the other, the deplorable effect of this rule was abrogated by the **Law Reform (Miscellaneous Provisions) Act, 1934.** By this Act, all causes of action subsisting against or vested in any person on his death, except cause of action for defamation, are kept alive against one for the benefit of the legal representatives of the deceased. Corresponding to the 1934 Act, in England, the provisions of the Indian Succession Act, provides that all cause of action in favour of or against a person survive, except those for defamation assaults defined in the Indian Penal Code and other personal injures not causing the death of the party. The term "personal injury" has been interpreted to mean not merely physical injury, but also any injury other than one to the estate of the deceased person. On this interpretation an action for malicious prosecution would abate on the death of either party.

9.2.3. By judgment recovered :

When an action is bought before a tribunal or court of competent jurisdiction seeking redress for the tort committed and it proceeds to final Judgement the liability for the tort comes to an end. If the plaintiff fails, he is debarred from asserting his alleged right once over again by another legal proceeding. If he succeeds, the original right in respect of which he sued is merged in judgment given. That judgment is binding and conclusive on the right of the parties to the suit and even if it remains unsatisfied, the original right is not revived.

Limitation:

Under law a certain period is fixed for enforcement of a person's right, whether such claims are based upon torts or any other form of injuries. Such limitation of a person's rights is fixed in India under the **Indian Limitation Act, 1963** the reasons for the fixation of such period of limitation are mainly two fold:

In the first place, no one ought to be exposed to the risk or demands of which he may be quite ignorant and which, owing to changed circumstances, he may be unable to satisfy. Secondly, it may have become impossible or difficult, owing to the loss or document or evidence or the death of witnesses, to establish a defence which would have negatived the claim if it had been prosecuted more promptly.

Under the Indian Limitation Act, 1963 different periods of limitation have been provided for different torts. A plaintiff who wants to enforce remedy through court for the tort committed against him must institute the proceeding within the time limit fixed under the relevant article of the Limitation Act. A period of one year is prescribed for personal wrongs like false imprisonment, malicious prosecution, liable, or slander, seduction, procurement breach of contract, and illegal distress; a period of two years for actions under the Indian **Fatal Accidents Act 1855** and for actions under the **Legal Representative suits Act, 1855** against an executor or administrator. Lastly, a three year period of limitation is prescribed for actions of trespass to immovable property or for infringement copyright. Torts not specifically' provided for would be covered by the residuary article (Article 113) which' prescribes a period of three years.

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Claims for damages for personal injury or death caused by motor car accidents made before a Claims Tribunal are governed by the period of limitation of six months provided under the Motor Vehicles Act.

9.2.4. Waiver of Tort:

If a man has more than one remedy for the same wrong and he selects one among the available remedies abandoning the others, he is said to have waived the other remedies. Having made his choice he cannot later on pursue the remedies which he had given up.

The principal instance where the question of waiver arise are, - 1) When a trespass is committed over Immovable property and minerals timber or fixtures are severed and appropriated, the person who suffers loss in this manner may waive the unlawfulness of the severance and sue for the value of the minerals timber of fixtures served, 2) When a person's goods are wrongfully appropriated by another the owner of such goods may sue for damages for the tort of conversion or sue the wrong-doer on a contract implied in laws (quasi - contract) to refund the proceed. One may wonder as to why should a plaintiff ever wish to waive his action in tort or one in quasi-contract. This was due to the fact that under the old system of proceedings in Courts in England, certain advantages were made by this preference of one form of action to the other.

The principle underlying the doctrine of waiver is firstly to avoid multiplicity of proceedings and secondly, if a person reasonably gives the impression that he has waived a particular remedy it would not be equitable to allow him to go back to the alternative remedy. By subsequent procedural reforms introduced in England, these advantages have been more or less done away with.

9.2.5. Accord and Satisfaction:

Check Your Progress

2. Explain Accord and Satisfaction.

Tortiuous liability incurred by a personal can be extinguished by agreement for valuable consideration between the person wronged and the wrong-doer. The agreement is called an "accord" and the consideration is called "satisfaction". When the satisfaction has been performed and accepted, the original right of action comes to an end and in consequence, accord and

satisfaction constitute a complete defence to any further proceeding to enforce the tight. In general, the right of action is not discharged until the satisfaction is performed. An accord, like any other agreement is not binding unless it is supported by valuable consideration. Delivery of something to which the plaintiff is already entitled is not a sufficient consideration.

9.2.6. Release:

Closely akin to accord and satisfaction is release of tortiuous liability given by the injured party. In fact, there seems to be little difference between the two except that a release is usually embodied in a document and there is no necessity for consideration. In India, under section 63 of the Indian Contract Act consideration is not necessary for a release .

As already stated, the rule in **Merrywaether Vs. Nixon** and **Brinsmed Vs. Harrison** has been abolished.

In India in the case of **Dhenai Vs. Chandrasekar** it was held that rule laid down in **Merryweather Vs. Nixon** did not apply.

In the year 1988, Motor vehicles Act has been amended and section 140 'No Fault Liability' has been introduced. As per section 140 where death or permanent disablement of any person has resulted from an accident, arising out of the use of a motor vehicle, or motor vehicles the owner of the vehicle shall, or as the case may be the owners of the vehicles shall jointly or severally be liable to pay compensation.

Hence the Amendment Act 1988 says, statutorily when two vehicles involved, anyone of the vehicle is liable to compensate the loss. In the case of **Theethi and another V. Motor Accidents Claims Tribunal, Palakad** (A.I.R.1996 Kerala 237) the petitioner's son was traveling in Taxi car on 22-11-1992 and was hit by a lorry and the lorry was not traceable. When the claim was made against insurance company it was contended, the lorry was not traceable and identifiable. But the court rejected the contention, even if anyone of the vehicle is not traced or identified, vehicle which involved in the accident is jointly and severally liable to compensate the loss. Hence the claimants are free to realize the amount of compensation from any of the Tort feasors which they

(Space for Hints) like and the Tort feasor who made the payment of compensation amount will be free to recover the apportioned amount from the other Tort feasor. **National Insurance company Vs. Chand Ratan and others (2003 ACJ 361) Kirti Vs. Rajendra (2000 ACJ. 306).**

9.3. REMEDIES

Remedies are of two kinds 1.judicial and 2. Extra Judicial. The former is sought through court, whereas the latter is secured by means of self-help without the assistance of court.

Judicial remedies are mainly three in number viz,

(i) Damages;

(ii) Injunctions and

(iii) Specific restitution of property.

9.3.1. Damages :

It is to be noted that the word Damage and the expression 'Damages' have distinct meanings in law. Damage signifies the legal injury suffered or (actual loss) by the party, Whereas the latter expression means the pecuniary compensation given to the injured party. Damages are given to a party for the damage suffered by him. Such damages may be either general or special damages. General damages are presumed by court as the natural consequence of the defendants acts. They need not be mentioned in the pleadings. Special damages are to be set out in the pleadings and has to be proved by the claimant.

This varies according to the special circumstances involved in the case. To take an instance, in an action for false imprisonment, general damages for inconvenience, indignity and discomfort are recoverable. Whereas if the plaintiff has incurred medical expense, payment to lawyer, or loss of wage, this has to be specifically alleged and proved since they are cases of special damages.

The general rule adopted by court in fixing the compensation is the doctrine of Restitution in integrum i.e., to put the injured in the same position in which he was, as far as possible. Thus, if A's cycle worth Rs.400/- is damaged by

(Space for Hints)

the negligent riding of B, B will be compelled to get a cycle of the same type and model or pay the value. But there may be cases where the amount of compensation granted will not be exactly the same required to replace the loss. These are cases where courts award an amount which it thinks fair and adequate compensations for the injury or loss. In such cases it is purely compensation and restitution.

Kinds of Damages:

1. Contemptuous or 'ignominious' damages: Contemptuous damages are nominal damages awarded by the court to parties who, though technically right and successful , have come to court with unclean hands and the court feels that no action should have been brought. It awarded as a mark of disapproval by the court of the conduct of successful plaintiff who is equally blame worthy. In such cases a shilling in English law or a paise in Indian law may be granted.

2. Vindictive damages (exemplary or deterrent damages): This type of damages are awarded by court, when it views with extreme displeasure the wanton misconduct of the defendant in utter disregard of the plaintiff's rights. Where a father sues for seductions of his daughter, or where a lady student sues for assault for having kissed her in public by a male student against her will, the court awards exemplary damages so as to deter other like minded persons from indulging in such wrong. Exemplary damages represent a solarium for the outrage of the plaintiffs feeling or the insult given to the injured party. **Broome Vs. Cassel** (1971). The decision of court of Appeal was affirmed by the House of Lords. The jury awarded exemplary damages of £ 25,000 besides the purely compensatory damages of £ 15,000 in all £40,000.

3. Nominal damages: Nominal damages are awarded (e.g. a paise or a shilling) to signify the infringement of a legal right even though the plaintiff has not sustained any material loss e.g., trespass invasion of a right of easement etc. **Ashby Vs. White (1703).** Held an elector had a right of action for having his vote maliciously rejected although the candidate for whom the wanted to vote was elected.

Check Your Progress

3. What are the different kinds of damages.

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4. Real damages: Real damages represent compensation for actual loss suffered. They are also called ordinary or substantial or compensatory damages. Such damages are awarded in a great majority of action in tort.

9.3.2. Injunctions:

Injunction is an extraordinary judicial remedy resorted to by parties and given effect to by court in exceptional cases. It is an order of the court directing the defendant to do an act he is legally bound to do, or to abstain from commission, continuance or repetition of an unlawful act. It is mandatory in the former and prohibitory in the latter case. Injunctions are supplementary to the ordinary and usual remedy of damages granted according to the discretion of the court in cases where damages would not amount to adequate redress. Indian Law dealing with injunctions is contained in sections 36 to 42 of the Specific Relief Act, 1963.

Interlocutory and perpetual injunctions: Injunctions is called interlocutory (temporary) when it is issued temporarily and perpetual when it is issued temporarily and perpetual when it is made permanent later. An interlocutory injunction is issued provisionally before the final hearing of the pending suit or to prevent the commission or continuance of an alleged injury in the meantime, or pending an enquiry into the case and final determination of the right of the plaintiff to a perpetual injunction. A perpetual injunction is issued after the final hearing or determination of the question at issue between the parties and it comes out in the form of a decree. Temporary injunction is issued only when there is a prayer for perpetual injunction.

Quia-timet: it is an injunction to restrain the commission of a tort, issue when the plaintiff proves that imminent damage of a substantial kind, or irreparable- damage will be caused to him unless the injunction sought for is granted.

Check Your Progress

4. Write a note on Injunction.

9.3.3. Specific restitution of property:

Where a person is dispossessed of property either movable, or immovable he is entitled to recover with the assistance of court, the specific item of property.

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The Indian law on the point is contained in sections 7 and 8 of the Specific Relief Act, 1963.

Extra-judicial remedies:

1. **Expulslton of trespasser:** Where a person has unlawfully trespassed into your land, you are entitled in law to expel the intruder with reasonable use of force. No matter even if you have no title to the property, it is enough you have the right to immediate possession. Here the force used shall not be more than is required to repel the intruder and for the purpose of your re-entry.

2. **Right to re-entry on land:** A person who has been wrongful or forcibly dispossessed or ejected out of his land can re-take its possession or re-enter on it peacefully and with using force or the force used is reasonable and does not transgress the reasonable limits of the occasion.

3. **Re-caption of chattels:** A person entitled to immediate possession of goods can recover it form the person possessing it wrongfully from the beginning provided the degree of force used is barely necessary to take back the chattel.

Illustration :

You can run after a thief who took your fountain pen and flees with it, seize it, and forcibly take it back.

9.4. SUMMARY

Once a tort is committed, a vested right of action springs in favour of the injured person. It vested right of action will come to end by different methods which were explained in detail with illustrative cases in this unit. Further, you have studied about various remedies available for the damages suffered by plaintiff. It specially highlights the sections of Specific Relief Act for the special damage provided as a relief.

9.5. ANSWER TO CHECK YOUR PROGRESS

1. Refer 9.1
2. Refer 9.2.5

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3. Refer 9.3.1

4. Refer 9.3.2

9.6. KEY WORDS

Discharge	-	to relieve
Waiver	-	surrender
Accord	-	assent
Extra Judicial Remedy	-	Remedy available other then Judicial forum.

9.7. MODEL QUESTIONS

1. 'All persons are entitled to sue and are liable to be sued in tort' – Examine this statement and state the exceptions if any to this statements.

2. "The test of reasonable foresight is relevant to determine capability but not to compensation" - Discuss.

3. Remedies in tort are two kind - judicial and Extra judicial - Discuss the two remedies in detail.

4. 'Every injury imparts damage but every damage is not injury' - Discuss the statement in the light decided cases.

UNIT – 10

CONSUMER PROTECTION ACT

INTRODUCTION

In this last unit you are going to study the sailent features of the Consumer Protection Act. You know very well the facts of the **Donaghue Vs. Stevenson** Case, that case blossom of the new flower in the law of torts. we have several legislations enacted for protection of consumers. i.e. - Prevention of food Adulteration Act, Drugs and Cosmetics Act, Sale of Good Act etc., However the victimised consumers are forced to wait for remedy in long period as per the above set of legislations. So our legislators enacted the Consumer Protection Act for the purpose of providing uniform, collective and speedy justice. We will discuss the salient features of the Act in detail in this unit.

UNIT OBJECTIVES

- ♦ To study the salient features of the Consumer Protection Act.
- ♦ To understand the various Authorities under this legislation.
- ♦ To observe the powers of the District Forum, state and National Commissions.

UNIT STRUCTURE

10.1. Scope and object of the Consumer Protection Act

10.2. Outline of the Consumer Protection Act.

10.3. Definition and Explanations

10.4. District Forum

10.5. State Commission

10.6. National commission

10.7. Summary

10.8. Answer to check your progress

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10.9. Key Words

10.10. Model question

10.1. SCOPE AND OBJECT OF THE CONSUMER PROTECTION ACT

Consumer protection Act was passed in the year 1986. The Act was passed with the object that to promote and protect the rights of consumers. (a) the right to be protected against marketing goods which are hazardous to life and property, (b) the right to be informed about the quality, quantity, potency, purity standard and price of goods to protect the consumer against the unfair trade practice (c) the right to be assured access to an authority of goods at competitive prices; (d) the right to seek redressal against unfair trade practice or unscrupulous exploitation of consumers and (e) the right to consumer education.

The Act was passed originally in the year 1986, amended in the year 1991, 1993 and 2003 and the amendment Act 62 of 2002 came into force on 15.03.2003. The consumer protection Amendment Act 62 of 2002 brought so many drastic changes to protect the interest of the consumer effectively. The Act effected the following amendments in the Consumer Protection Act, 1986.

1. Creation of circuit benches of the state Commission and National Commission (Section 17B and 22C).

2. Period within which complaints are to be dispossed under Section 13 (3–A). Every complaint shall be heard expeditiously as possible and be decided within a period of three months where the compliant does – not require analysis (or) testing of commodities and within a period of five months - if the complaint requires analysis and testing of commodities. No adjournment shall be ordinarily granted unless sufficient cause is shown.

3. Under section 11 the pecuniary jurisdiction of the Forum District has been enhanced from 5 Lakhs to 20 Lakhs i.e., District Forum can entertain complaint upto 20 Lakhs. Under section 17 pecuniary jurisdiction has been enhanced to Rs. 1 Crore the State Commission can entertain complaint from 20 Lakhs to 1 Crore. Under Section 21 the pecuniary jurisdiction of the-National Commission is exceeding 1 Crore.

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4. Provision are made, under Section 15, appeal is the State Commission to deposit fifty percent. of the award amount or Rs.25,000/- whichever is less.

Under Section 19 if the appeal to be filed before National Commission, Condition to deposit fifty present of the award amount or Rs.35,000/- whichever is less.

Under section 23 if the appeal is before Supreme Court as condition to deposit fifty percent of the amount or Rs. 50,000/- wichever is less.

5. Services availed for commercial purpose is excluded from the purview of consumer disputes (section 2 (d) define – consumer)

6. Minimum Qualification for members are, prescribed (Sections 10, 16 and 20), provision made for reappointment of Chairman and Members.

7. Express conferment powers or the Judicial Magistrate First Class on the Consumer Disputed Redressal Agencies petition. Section 27 says when the trader or a person fails or omits to comply with the order made by the consumer forum, shall be Punished with not less than one month but may extend three years, or with fine, shall not be less than two thousand rupees but may extend to ten thousand rupees with both.

Not with anything contained in the code of Criminal procedure, the consumer forum shall have power of the judicial Magistrate of the first Class for the trial of the offences under this Act.

8. Provision made for issue of interim orders by the Consumer Forum Section 13 (3) B.

9. Provision made to implead legal representatives in the event of Death of complainant or opposite party Section 13 (7).

10. Establishment of Consumer Protection Councils at the centre and state levels are made necessary requirement, also provide for the establishment of District consumer Protection Councils at the district level (Sections 4, 6 and 8-A).

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10.2. OUTLINE OF THE CONSUMER PROTECTION ACT

Section 2 deals with some important definitions such as complaint, complainant, consumer, service, unfair trade practice, respective trade practice etc. Section 4 to 8 deals with the Consumer protection Councils and Sections 9 to 23 deals with the composition and jurisdiction of District Forum, State Commission and National commission, etc. The Act gives protection to the interest of the Consumer, who buys goods and hires or avails services from the manufacture or Supplier. If there is any defect or deficiency in the goods supplied and in the services hired or availed, the manufacture or the supplier, is liable to compensate the loss. Section 2 (g) of the Act defines deficiency. Deficiency means any fault, imperfection. shortcoming, or inadequate in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken, to be performed by a person, in pursuance of contract, or otherwise in relation to any service.

If a person purchase a goods for resale or commercial purpose, it is not covered under Consumer Protection Act. If the services also hired for commercial purpose, it is not covered under Consumer Protection Act. Just like that if the service rendered free of charge or under contract of personal services no liability will arise under Consumer Protection Act.

10.3. DEFINITIONS AND EXPLANATIONS

a) Complaint

Section 2 (C) defines Complaint means any allegation in writing made by a complainant that

(i) an unfair trade practice or restrictive trade practice has been adopted by any trader or service Provider.

(ii) The goods bought by him or agreed to be bought by him suffer from one or more defects;

(iii) the services hired or available of or agreed to be hired or availed of suffer from deficiency.

(iv) a Trader has charged the goods in excess of the price, fixed or displayed or agreed.

(v) goods which will be hazardous to life and safety;

(vi) services which are hazardous to life and safety

Hence, the trader practicing unfair trade practice, or the goods suffer from any defect or the services hired suffer from any defect or the trader charged the goods in excess of Price fixed and the goods and services are hazardous to life and safety, constitute complaint.

If the complaint given for speculative transactions, the complaint is not maintainable. In the case of **Unit Trust of India Vs. Sabitradevi Agarwal 2000 (11) CPJ.4 NC** the complaint purchased shares, and sent than to Unit Trust of India for transfer. During the pendency of transfer, the complainant entered into contract, to sell the shares and be could not sell the shares, since the transfer was not effected by UTI. Because of delay in transfer, the complainant filed claim of compensation, the National Commission dismissed the complaint as speculative transactions.

Even if the opposite party is public trust. the compliant is maintainable. In the case of **H.R. Gill Vs. Suryavanshi Kshatriya Samaj and others 1992 (I) CPR 647,** the opposite party Suryavanshi Kshatriya Samaj, is a public trust owning marriage hall. The complainant booked the marriage hall for his son's marriage. The hall was booked on 07- 03-1990 and the complainants paid Rs.3001/-. The marriage date was 05-06-1990; but in the meantime; the opposite party Manager compelled to take hire of utensils, for catering purpose and demanded Rs.800/- and the complainant paid by cheque sum of Rs.800/-. But the Manager not satisfied with the cheque. At the time of marriage, switched off the electricity and caused inconvenience. The Complainant suffered humiliation and disgrace and claimed compensation of Rs.50,000/- But the Consumer Forum allowed damage to the tune of Rs.l,500/-.

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(b) Complainant

According to Sec.2 (h) complainant means

(i) a consumer

(ii) any voluntary consumer association registered under the Companies Act, 1956, or under any other law for the time being in force;

(iii) the central or the state Government;

(iv) One or more consumer, where there are numerous consumers having the same interest.

(v) in the case of death of a consumer, his legal heir or representatives.

In the case of **Spring Meadows Hospital Vs. Hanjit 1998 (4) SCC 39** the principle that even a family member can maintain complaint was emphasised. If there is any dispute as to maintainability, it must be decided at the earliest opportunity. Joint complaint cannot be made by different persons. Four person purchased seeds jointly in one shop when they filed joint complaint consumer Forum directed to file separate complaint **(Basappa Vs. Murtumjay Seeds 2000CPJ 123).**

(c) Consumer

Section 2 (d) defines consumer. Consumer means any person who,

(i) buys any goods for consideration which has not been paid promised or under any system of deferred payment and includes any user of goods, when such use is made, with the approval of such person, but does not include a person who obtains such goods for resale or commercial purpose.

Check Your Progress

1. Who is a consumer?

(ii) hires or avails any service for consideration paid or promised or partly paid or promised or under any system of deferred payment includes beneficiaries of such services when services are availed with the approval of the first mentioned person but does not

include a person who avails such services for any commercial purpose.

Explanation

Commercial purpose, does not include any personal goods bought or services availed exclusively to earn his livelihood by means of self-employment.

According to the definition, if any person purchases goods for resale or commercial purpose and services hired or availed for commercial purpose, will not come within the purview of Consumer Protection Act.

Goods purchased even for commercial purpose and if warranty period is not over the Consumer is entitled to remedy under Consumer Protection Act. In the case of **Sukphal and Co. Vs. Ramesh Kumar 2000 C.C.J. 186** the Complainant purchased one ceat tyre, one tube and one flap from Sukphal and Company for Rs.8,200/-. The Complainant again on 29-12-1993, purchased two more ceat tyres two tubes and two flaps on payment of Rs.16,700/-. After a month, defect was found and the complainant wanted to replace the tyres and tubes. But the company refused and disputed the claim as commercial purpose, but the Consumer Forum directed to replace the tyres and tubes since warranty period is not over.

Complainant was nominee and after the death of her husband she claimed policy amount. The appellant life Insurance Corporation repudiated the claim on the basis the employer, mandal development officer, did not pay the premium payable on 20-4-1977, 20-05-1997 and 20-6-1997 before policy got lapsed. But the commission held that the complainant is entitled to insurance amount and directed to pay policy amount, deducting three months premium without interest **(Life Insurance Corporation of India Vs. B.S.P. Jyothi) 2000 C P J.**

The Complainant is having telephone connection at his residence and the average, bi-monthly bill was Rs. 250/-. Further for the period from 26-3-1997 to 25-5-1997 there was sudden spurts in change for metered Calls, and the bill amount came to Rs. 25,064/- Though the complainant sent a petition, the opposite party has not taken any action and the commission directed the department to issue fresh bill on the basis of average of 6 previous monthly bills except

(Space for Hints) disputed bills and 10% and Rs. 1,000/- as costs. **(General Manager Telecom. District Vs. M.A. Rasheed. 2000** C P J.

In the case of **Vimal Chandra Vs.Bank of India AIR 2000 S.C. 2181**, the Bank had given overdraft facility to the complainant against the pledge of shares. The order to clear the overdraft account the appellant requested the Bank to arrange for sale of 500 shares, of Castrol Limited after 12 days of the receipt of this letter, the Bank agreed to sell the shares. But the later Bank failed to sell the shares as agreed and the complainant filed claim. The bank contented that it was not obliged to sell the shares, but the court held that there was negligence on the part of the Bank.

Further in some of the cases the Insurance company may limit to number of persons to be travelled in the vehicle. Commission overriding the principle and the terms and conditions of overloading held the claim cannot be repudiated. In **New India Assurance Company Vs. Smt. Mithilesh,** truck was carrying 13 persons and the accident accrued, when the vehicle collided with another vehicle. The company repudiated liability as overloading and the vehicle can carry only 6 workmen excluding the driver. But the commission held that the carrying more passengers, namely 9 men, it cannot be taken as that the risk here in any way increased by carrying more passengers. The Insurance company was held liable and the commission also relied upon the supreme court judgment in **B.V. Nagarajan Vs. Oriental Insurance Company - 1996.**

In the case of Transport by land, air, railway, any inconvenience or any loss sustained due to deficiency in the transport services, consumer can claim compensation before consumer forums. In **Divisional Railway Manager, South Eastern Railway Vs. Venkateswara (2000)** the complainant wanted to go to Delhi and reserved seven first class tickets from Visakapatinam to New Delhi by paying Rs. 6,692/- On the day of journey he reached the station half and hour before the departure of the train. But to his surprise, he found no first class carriage and the complainant demanded at least to arrange for second class journey. But the station master refused to do anything and the complainant's family, throughout night, have to spend the time in the platform and on the next day, the complainant had to travel by II class. The first class ticket was

cancelled without any intimation. For the inconvenience and mental agony. Commission directed the Railways to pay each passenger Rs. 1,000/- as damages.

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(e) Unfair Trade Practice

Section 2 (2) of Consumer Protection Act, 1986 defines unfair trade practice – A trade practice for the purpose of promoting sale use or supply of goods adopts any unfair, or deceptive practice including any of the following practices :-

1. The practice making any statement, orally or in writing or by visible representation,

    (i) Falsely represents that the goods are of particular standard, quality, quantity grade, Composition , style or model.

    (ii) Falsely represents that the services are of particular standard, quality, grade;

    (iii) Falsely represents any rebuilt, second-hand, renovated, or old goods as new goods.

    (iv) represents that the goods are service have sponsorship, approval or performance, which the goods or services don't have .

    (v) represent the seller or supplier have sponsorship, approval or affiliation which the seller or supplier don't have

    (vi) makes false or misleading representation concerning the need for usefulness of any goods or services;

    (vii) gives to the public any warranty or guarantee which is not based on adequate and proper test warranty or guarantee materially misleading the public and there is no reasonable prospect that warranty or guarantee will be carried out.

    (viii) materially misleads the public concerning the price.

Check Your Progress

2. What is Unfair Trade Practice?

(Space for Hints)

(ix) gives false or misleading facts disparaging goods or services;

2. Permits the publication of any advertisement at a bargain price, but not intended to be offered for sale.

3. permits offering prizes (or) gifts with the intention of not providing them and creating impression that something is offered free of charge.

4. permits the sale or supply of goods don't comply with the standard, prescribed.

5. permits the hoarding or destruction of goods or refuses to sell the goods by which to raise the cost of the goods.

The above practice of trade will be fair trade practice and the consumers who sustains any loss or inconvenience can claim compensation from the manufacturer or supplier. The same principle of unfair trade practice is also found in section 36 (A) of the Monopolis and Restrictive Trade Practices Act 1969. The same introduced a section 36 (A) by amendment in the year 1984.

False and misleading advertisement will become unfair trade practice. During 1988 the Respondent made advertisement that Hi-Technology park city would be developed in Block A village Tusiyana District in Gaziabad. The applicant lured by it booked a by making payment of Rs. 25,835/- Accordingly the respondent allotted No:H.366 measuring 135 sq meters for total consideration of Rs.-64,5841/- Remaining 60% was paid in 36 instalments. Even after entire payment, the applicant waited for years and plot was not allotted. The commission held that the advertisement is misleading and the commission directed to pay back the collected amount Rs. 58,125.60 together with the interest 18% per annum and awarded compensation for mental agony, a sum of Rs. 10,000/- **(Narendra Kumar Gupta Vs. M/s. Technology Park Ltd 2000).**

In the case of **Hanuma Vs. Meena Jewellery (1992)** the complainant purchased gold ornaments and it was; represented that it is 22 carat, but it was put as 22/18 carat. The commission indicated it as unfair trade practice.

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In the case of **John Vs. Thomas (2000)** the company adversed special discount offer of flow of low price i.e., save Rs. 2,50,000/- special low price 2,45,000/-. The complainant on seeing the advertisement paid the amount But at the time of delivery, they demanded further sum of Rs. 7,000/- and complaint was given as unfair trade practice by misleading price by advetisement. The company contended that price is liable to change and also displayed in the advertisement. But the commission held that price is liable to change without notice is displayed in very small letters in the advertisement and that is misleading" .

The complainant purchased on seeing the advertisement given by the respondent that the engine was manufactured by V.S.T. Tillers and Tractors, Bangalore with joint collaboration of Mitshbushi, Japan. After purchase, the complainant found that the vehicle is not giving satisfactory service, and also found engine was not that of Mitsubusbi, Japan. The commission held that the promise is false misleading and the respondent was directed to repay the amount in full by receiving the vehicle – **Boziwada Vs. Jaikishan Bhai Bapalal Nirmal 1992.**

In the case of Railway administration, without improving and increasing the basic amenities, increasing railway fare is unfair trade practice. The principle has been laid down in **N. Prabbakaran Vs. Southern Railways, 1991**. The complainant is a small scale industrialist and regular traveller in first class by season ticket. It was complained that the first class compartment is not having cushion sheet whereas other train having cushion seat and further II class travellers occupy the 1st class compartment causing uneasiness commotion and inconvenience. The commission gave directions, to provide cushion sheets in first class compartments, and to prevent the II class travellers not to travel in first class.

Booking amount not refunded when car booked was cancelled held as unfair trade practice. In the case of **Fera Limited Vs. Pal Peugeot Ltd. 2000,** Fera Limited booked car with the opposite party on 31-10-1995. On 14-10-1996, the applicant surrendered the receipt and cancelled the booking. The company failed to repay the booking amount and the commission held it as unfair trade practice and directed the company to repay the booking amount with interest.

Check Your Progress

3. What is a complaint?

(Space for Hints)

10.4. DISTRICT FORUM

Section 10 of Consumer Protection Act deals with the composition of the District forum and sections 11 to 14 deal with the jurisdiction of the forum.

District forum shall consists of president and two members.

The President is or has been or is qualified to be District Judge.

The two members, one of whom shall be woman and not less than 35 years of age, possesses Bachelor's degree, and be persons of ability, integrity and standing and have adequate knowledge and experience of atleast 10 years, in dealing with the problem relating to economics, law, commerce, accountancy, industry, public affairs or administration.

A member shall be disqualified, if he bas been convicted for any offence involving moral turpitude, undischarged insolvent, unsound mind, or removed or dismissed from service of the government and in the opinion of government financial or other interest is likely to be prejudiced.

The above appointment shall be made on the recommendation of the selection committee consists of president of the State Commission, Secretary Law Department and Secretary, Consumer affairs. The members shall hold office for a term of 5 years or upto the age of 65 years whichever is earlier.

The members shall also be eligible for reappointment subject to maximum age of 65 years. The salary or honorarium and other allowances shall be payable as fixed by the government.

(a) Jurisdiction of District Forum:

Check Your Progress

4. Explain the composition of District Forum.

Section 13 deals about the jurisdiction of the District Forum. The District Forum shall have jurisdiction to receive and entertain complaints upto 20 Lakhs.

The complaints shall be instituted against the opposite party who actually or voluntarily or personally works for gain and the cause of action wholly or in part arises.

If the complaint is filed, within 21 days, copy of the complaint shall be refused to the opposite party and directing him to give his version within 30 days.

If the Complainant alleges any defect in the goods, the same will be referred to proper analysis or test of goods to the appropriate laboratory and direction will be given to submit report within 45 days:

The complainant may be directed to deposit amount to the credit of the laboratory. If any of the parties dispute the correctness of the report, the party may file objections.

When the Opposite Party on the receipt of the complaint, denies or omits or fails to take any action, to represent his case within the time given by the District Forum, the Forum shall proceed to settle the consumer disputes on the basis of evidence, brought to its notice by the complainant and the Opposite Party. Where the Opposite Party denies or disputes the allegations contained in the complaint or experts on the basis of evidence brought to its notice by the complaint. Where the Opposite Party omits or fails to take any action to represent his case within the time given, where the complainant. fails to appear on the date of hearing the District Forum may either dismiss the complaint for default or decide on merits.

Every complainant shall be heard as expeditiously as possible within 3 months or within 5 months if it requires analysis or any test.

No adjournment shall be granted unless sufficient cause is shown and the District Forum shall order as to costs occasioned by the adjournment.

During the pendency of any proceeding, it may pass such interim orders as it is just and proper on the basis of facts and circumstance of the case.

The District Forum shall have the power of the civil court under Civil Procedure Code 1908 in respect of the matters 1) the summoning and enforcing attendance of any Defendant or witness, 2) the discovery and production of any document; 3) the reception of evidence on affidavits, 4) the requisitioning of the report of the analysis; 5) issuing of any commission for the examination of any witness; 6) any other matter which may be prescribed. Before the District Forum, Order I, Rule 8 and Order 22 of the Civil Procedure Code is also applicable.

(Space for Hints) Under Section 14, the District Forum shall have power to issue orders:

1) to remove any defect

2) to replace the goods;

3) to return to the complainant the prices

4) to direct to pay compensation;

5) to order to discontinue the unfair trade practice

6) order not to offer hazardous goods for sale

7) to order to issue corrective advertisement

8) to provide adequate costs

Under Section 15, if any person is aggrieved by the order may appeal to the State Commission Within a period of 30 days. The appeal may also be presented beyond 30 days if sufficient cause is shown. As a condition 50% of the award amount or Rs. 25,000/- which ever less to be deposited.

10.5. STATE COMMISSION

Composition

Section 16 deals with the composition of the State Commission. Each state commission shall consist of president and not less than two members.

The President shall be a person who is or Who has been a Judge of a High Court. The members, one of whom shall be woman, not less than 35 years of age, possesses Bachelor Degree and the persons of ability, integrity and standing and have adequate knowledge and experience of atleast 10 years n dealing with the problems relating to law, economics, commerce, accountancy. industry, public affairs or administration and not more than fifty percent of them members shall be from persons having judicial background.

(Space for Hints)

A person shall be disqualified for appointment as member, if he bas been convicted for any offence involving moral turpitude, or is an undischarged insolvent, or is of unsound mind, or removed or dismissed from the service of government and in the opinion of the government financial or other interest is likely to be prejudiced.

The above appointment shall be made by the selectian committee consisting of President of the State Commission, Secretary-Law Department and Secretary-consumer affairs.

The jurisdiction may also be exercised by consisting a Bench.

Every member shall hold office for a period of five years or upto the age of Sixty-seven years whichever is earlier.

Member shall be eligible for reappointment for another term of 5 years subject to maximum of 67 years.

Jurisdiction of the State Commission :

Section 17 deals with the jurisdiction of the State Commission

State commission shall have jurisdiction to entertain complaints exceeding 20 Lakhs but does not exceed Rs. 1 Crore of the value of the complaint.

State commission entertain appeals from District Forum and to call for records from the District Forum and to pass appropriate orders of it has exercised jurisdiction not vested in it by law, or has failed to exercise jurisdiction so vested or has acted in exercise of jurisdiction illegally or with material irregularity.

The provisions of Sections 12, 13 and 14 is applicable for. the disposal of the complaint. The state commission shall have powers to transfer cases from one District Forum to another District Forum.

Any person aggrieved by the order of the State Commissioner can appeal to the National Commission within a period of 30 days. Appeal can also be filed

(Space for Hints)

beyond 30 days if sufficient cause is shown. In order to appeal 50% of the award amount or Rs. 35,000/- whichever is less is to be deposited as a precondition.

10.6. NATIONAL COMMISSION

Section 20 deals with the composition of the National Commission.

National Commission shall consist of President and not less than four members. The President shall be a person Who is· or who has been a Judge of the Supreme Court.

Of the members one shall be a woman, not less than 35 years of age, possesses Bachelor Degree and the persons of ability, integrity and standing and have adequate knowledge and experience of atleast 10 years in dealing with the problems relating to law, economics, commerce, accountancy, industry, public affairs or administration.

A member shall be disqualified, if he has been convicted for any. offence involving moral turpitude, or is an undercharged insolvent, or is of unsound mind, or removed or dismissed from the service of government and in the opinion of the central government financial or other interest is likely to be prejudiced.

The above appointment shall be made by the selection committee consists of a person who is Judge of the Supreme Court to be nominated by Chief justice of India as Chairman and two members the Secretary in the Department of legal affairs and secretary in the department of Consumer affairs.

Every member shall hold office for a period of five years or upto the age of seventy years whichever is earlier. Member shall be eligible for another term of 5 years is subject to maximum of 70 years.

Jurisdiction of the National Commission :

Section 21 deals with the Jurisdiction of the National commission.

1. The National Commission shall have jurisdiction to certain complaints, Where the value of tile goods or compensation claimed is more than **one Crore.**

2. Appeals against the state commission.

3. To call for records and to pass appropriate orders from the State Commission, if the State Commission has exercised jurisdiction not so vested or failed to exercise jurisdiction so vested or exercised jurisdiction illegally or with material irregularity.

The provisions of Sections 12, 13 and 14 an: applicable or the disposal of tile complaint and appeals. The National commission shall have powers to set aside sexpartite orders (Section 22-A). The National Commission shall have powers transfer cases from one State to another state commission (Section 22-B). The National commission shall have powers to Constitute circuit benches (Section 22-C).

Under section 23 any person aggrieved by the orders of the National commission may appeal to the Supreme court within a period of 30 days and if sufficient cause is shown, the appeal may also be filed beyond 30 days. The precondition for appeal is to deposit 50% of the award amount or Rs. 50,000/- whichever is less.

10.7. SUMMARY

The Consumer Protection Act 1986 aims at helping a consumer in getting speedy remedy of his complaint through specially established forums and commissions. We have already discussed detailed in the earlier pages.

10.8. ANSWER TO CHECK YOUR PROGRESS

1. Refer 10.3

2. Refer 10.3

3. Refer 10.3

4. Refer 10.4

(Space for Hints)

10.9. KEY WORDS

Consumer	-	a person who uses goods
Authorities	-	officials
Complaint	-	a statement about defects
District Forum	-	where a consumer can appeals for redressal
State commission	-	state level appellate authority
National commission	-	National level appellate authority

10.10. MODEL QUESTIONS

1. Who is a consumer and discuss with case laws?
2. Discuss the Composition, Powers and functions of District Forum.
3. Explain the provisions relating to jurisdiction of the to state commission.

(Space for Hints)

MODEL QUESTIONS

LAW OF TORTS AND CONSUMER PROTECTION ACT

Time : Three hours **Maximum : 100 marks**

PART A - (5 x 15 = 75 marks)

Answer any **Five** questions

Each question carries 15 marks

1. There are three essential conditions for liability in trot – Enumerate them and explain in detail.

2. Explain the following general defences :

   (a) Necessity.

   (b) Inevitable accident.

   (c) Act of God.

3. Explain the capacity of the following parties to sue and to sued :

   (a) Foreign sovereigns.

   (b) Convicts.

   (c) Bankrupts.

4. Write an essay on the theories of remoteness of damage.

5. ~~Write are~~ what are the modes of discharge of tort?

6. “A person is liable for all the direct consequences of his wrong art, whether he could have foreseen them or not” – Critically examine the statement.

7. Discuss with illustrations the rule regarding liability for keeping animals.

(Space for Hints)

PART B - (5 x 5 = 25 marks)

Answer any **Five** questions

Each question carries 5 marks

8. Write brief note on :

(a) Invitees

(b) Scienter rule

(c) Davies V Mann

(d) Conversion

(e) Conspiracy

(f) Kinds of damages

(g) Nervous shock.